Supreme Court, U.S.
FILED
08-567 OCT 27 2008
OFFICE OF THE CLERK

No. 10

IN THE
Supreme Court of the United States

AGRIPOST, LLC, a Florida Limited Liability Company (Successor by Merger to Agripost, Inc.) and AGRI-DADE, LTD., a Florida Limited Partnership, *Petitioners*,

v.

MIAMI-DADE COUNTY, FLORIDA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question 1. Should the Court overrule *Williamson County Regional Planning Commission v. Hamilton Bank* insofar as it denies property owners the right to litigate their *federal* causes of action in *federal* court, the same as all other constitutionally aggrieved citizens, and forces them to seek compensation in state court ostensibly to ripen their federal constitutional takings claims, where four Justices of this Court declared in *San Remo Hotel v. City and County of San Francisco* that the *Williamson County* rule is "mistaken" due to its lack of doctrinal underpinning and incoherent effect on federal jurisdiction?

Question 2. Where settled 11th Circuit law has for decades provided that a property owner following the *Williamson County* rule of state court ripening litigation may "reserve" federal issues for federal court trial, and in fact the 11th Circuit expressly so ordered in an earlier appeal of this case, can the property owner be punished for obeying such an order by having its eventual federal court suit dismissed on the basis of issue preclusion?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties are listed in the caption:

- Petitioners Agripost, LLC, a Florida Limited Liability Company (successor by Merger to Agripost, Inc.) and Agri-Dade, Ltd., a Florida Limited Partnership were the plaintiffs and appellants below.

- Respondent Miami-Dade County, Florida was the defendant and appellee below.

Pursuant to S.Ct. Rule 29.6, Petitioners state that Petitioner Agripost, LLC has no parent corporation and no publicly held company owns 10% or more of its stock. Petitioner Agri-Dade, Ltd.'s principal owner is Agripost Dade County, LLC, a Florida limited liability company which is itself wholly owned by Agripost, LLC. Agripost, LLC is also a general partner and limited partner of Agri-Dade, Ltd.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

INTRODUCTION 3

STATEMENT OF THE CASE 5

BASIS FOR GRANTING THIS WRIT OF CERTIORARI 8

I. THERE IS CONFLICT AND CONFUSION REGARDING THE ABILITY OF PROPERTY OWNERS TO SUE MUNICIPALITIES IN FEDERAL COURT FOR 5TH AMENDMENT VIOLATIONS 8

A. *Williamson County* Contained a Fatal Flaw: It Wrongly Assumed That a Fifth Amendment Taking Without Just Compensation is Not Complete Until a State Court Adjudicates That the Local Agency Really Will Not Pay 11

B. *City of Chicago*, Rendered a Dozen Years After *Williamson County*, Added Further Confusion to the "Ripeness" Procedure in Takings Cases 22

TABLE OF CONTENTS
(continued)

Page

C. *San Remo* Added to the Confusion by Applying *Williamson County* Despite Concerns About its Validity 25

II. THE 11TH CIRCUIT'S "SETTLED RULE" OF REMANDING TAKINGS CASES TO STATE COURT FOR *WILLIAMSON COUNTY* "RIPENING" MANDATES ALLOWING THIS CASE TO PROCEED 28

CONCLUSION 32

TABLE OF APPENDICES

Appendix A — 11th Circuit Court of Appeals opinion dated April 22, 2008.....App. 1

Appendix B — Judgment and opinion, U.S. District Court, Southern District of Florida, dated October 21, 2005.....App. 17

Appendix C — 11th Circuit Court of Appeals opinion dated Nov. 15, 1999.....App. 28

Appendix D — U.S. District Court, Southern District of Florida, decision dated September 5, 1997 .....App. 47

Appendix E — Florida Court of Appeals decision, March 26, 2003.....App. 62

Appendix F — Florida Supreme Court Order Denying Review, dated October 15, 2003.....App. 70

Appendix G — 11th Circuit Court of Appeals Order Denying Rehearing, dated May 30, 2008.....App. 72

TABLE OF AUTHORITIES

Page

Cases

Bell v. Hood,
327 U.S. 678 (1946) 17

Chicago B.& Q. R. Co. v. Chicago,
166 U.S. 226 (1897) 11

City of Chicago v. International College of Surgeons,
522 U.S. 156 (1997) ..... passim

City of Monterey v. Del Monte Dunes at Monterey, Ltd.,
526 U.S. 687 (1999) 20

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 24

Cont'l T.V., Inc. v. GTE Sylvania, Inc.,
433 U.S. 36 (1977) 24

Dodd v. Hood River County,
136 F.3d 1219 (9th Cir. 1998) 26, 30

Dodd v. Hood River County,
59 F.3d 852, 861 (9th Cir. 1995) 27

England v. Louisiana Medical Examiners,
375 U.S. 411 (1963) 4

Felder v. Casey,
487 U.S. 131 (1988) 16, 18

Fields v. Sarasota-Manatee Airport Auth.,
953 F.2d 1299 (11th Cir. 1992) ..... passim

TABLE OF AUTHORITIES
(continued)

Page

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 11, 15, 16

Funk v. U.S., 290 U.S. 371 (1933) 25

Jacobs v. United States, 290 U.S. 13 (1933) 15

Kelo v. City of New London, 545 U.S. 469 (2005) 13

Kottschade v. City of Rochester, 319 F.3d 1038 (8th Cir. 2003) 28

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 14, 15

McDaniel v. Sanchez, 452 U.S. 130 (1981) 25

McNeese v. Board of Education, 373 U.S. 668 (1963) 15

Monell v. Dept. of Social Services, 436 U.S. 658 (1978) 14

Monroe v. Pape, 365 U.S. 167 (1961) 14, 18

Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003) 12

Patsy v. Board of Regents, 457 U.S. 496 (1982) 16, 20

San Remo Hotel v. City & County of San Francisco, 545 U.S. 323 (2005) ..... passim

TABLE OF AUTHORITIES (continued)

Page

SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967) 24

U.S. v. General Motors Corp., 323 U.S. 373 (1945) 14

Wainwright v. Sykes, 433 U.S. 72 (1977) 18

Will v. Michigan Dept. of Police, 491 U.S. 58 (1989) 12

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) ..... passim

Wilson v. Garcia, 471 U.S. 261 (1985) 16

Constitution

U.S. Constitution, 5th Amendment ..... passim

U.S. Constitution, 11th Amendment 12

U.S. Constitution, 14th Amendment 2, 11, 13

Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1441(a) 9, 22

28 U.S.C. § 2254(b) 18

42 U.S.C. § 1983 ..... passim

42 U.S.C. § 4651(1) 17

42 U.S.C. § 4651(8) 17

Fla. Stat. § 421.55 17

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urban Lawyer 671 (2004) 27

Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century Just Compensation Law*, 52 Vand. L. Rev. 57 (1999) 16

J. David Breemer, *Overcoming* Williamson County's *Troubling State Procedures Rule*, 18 J. Land Use & Envtl. L. 209 (2003) 16

Steven J. Eagle, Regulatory Takings 1070 (2d ed. 2001) 20

Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. West. L. Rev. 1 (1992) 27

Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Report 17 (1997) 27

PETITION FOR A WRIT OF CERTIORARI

Agripost, LLC, a Florida Limited Liability Company (successor by merger to Agripost, Inc.) and Agri-Dade, Ltd. (collectively "Agripost") petition for a writ of certiorari to review a final judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reproduced as Appendix A, and the denial of rehearing is Appendix G. The Opinion affirms a judgment of the United States District Court, Southern District of Florida, reproduced in Appendix B. Earlier decisions in this matter by the Eleventh Circuit Court of Appeals and the United States District Court, Southern District of Florida are reproduced in Appendices C and D. A decision by the Florida Court of Appeals (required by the Eleventh Circuit decision in Appendix C) and an Order of the Florida Supreme Court denying review are reproduced in Appendices E and F.

JURISDICTION

The Eleventh Circuit entered judgment on April 22, 2008, and denied a timely petition for rehearing on May 30, 2008.

On August 14, 2008, this Court granted an application (No. 08A132) extending the time to file this petition to October 27, 2008.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, 5th Amendment:

". . . nor shall private property be taken for public use without just compensation."

U.S. Constitution, 14th Amendment:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law;"

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action

at law, suit in equity, or other proper proceeding for redress . . . ."

INTRODUCTION

This case demonstrates all that is wrong with *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), and shows clearly why four members of this Court, led by the late Chief Justice, urged that the Court find an opportunity to reconsider *Williamson County* and discard it. (See *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323, 351 [2005] [concurring opinion by Rehnquist, C.J., joined by O'Connor, Kennedy and Thomas, JJ].)

Briefly, *Williamson County* has created a Catch-22 of monumental proportions for property owners seeking to litigate 5th Amendment takings cases in federal court. *Williamson County* tells property owners that they *must first* litigate parallel state claims in state court in order to "ripen" their federal claims for federal court litigation. Upon doing so, however, their access to federal court is prevented by the doctrines of claim and/or issue preclusion. That is what happened in *San Remo* — triggering four Justices to urge reconsideration of *Williamson County* to end that procedural conundrum.

Petitioners here have been in litigation for a decade and a half, bouncing between state and federal courts as a result of this Court's decision in *Williamson County* and the 11th Circuit's settled rule applying *Williamson County* that required property owners who wanted to litigate a regulatory taking claim in federal court to first litigate that claim in state court, under state law, with a "reservation" of federal issues. (E.g., *Fields v. Sarasota-Manatee Airport Auth.*, 953 F.2d 1299 [11th Cir. 1992]. See App. p. 10, referring to *Fields* as "the settled law in this circuit.") [1]

After filing suit in U.S. District Court, Petitioners were ordered to proceed in state

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[1] The importance of a fresh federal trial was recognized by the Court in the abstention context: "How the facts are found will often dictate the decision of federal claims. It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues. . . . Thus, in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, *a litigant may not be unwillingly deprived of that determination . . . [nor of] his right to litigate his federal claims fully in the federal courts.*" (*England v. Louisiana Medical Examiners*, 375 U.S. 411, 416-417 [1963]; emphasis added.)

court under the *Fields* rule and then return. The 11th Circuit affirmed the District Court's Order so holding. The County then petitioned this Court for certiorari, which was denied.

After litigating unsuccessfully in the Florida courts — but reserving their right to litigate federal issues in federal court, as the 11th Circuit had directly ordered them to do — Petitioners returned to U.S. District Court, where they were told that the Florida proceedings had become res judicata. On appeal, the 11th Circuit held that to be error, but concluded that collateral estoppel would preclude the litigation in any event.

Petitioners were the victims of a judicial double whammy. Having filed suit in federal court initially, they were ordered to state court under the authority of *Williamson County* and *Fields*. After spending years in that process, they were told by the court that invented the *Fields* process in order to comply with both *Williamson County* and fundamental fairness that it was all for naught. That cannot stand.

STATEMENT OF THE CASE

Agripost was in the business of transforming waste material into useful fertilizer. Miami-Dade County announced a need for a plant to provide such a service and Agripost responded.

It obtained from the County a 20-year contract and a zoning permit for land it leased from the State, and then built the facilities with private funds — more than $36 million.

Later, the County staff notified Agripost that its plant was creating nuisance-like problems and suggested curative steps. After negotiating a timetable for the cure, Agripost set about dealing with the problem. Before allowing Agripost to complete the negotiated program, however, the County revoked the permit. As a consequence of the County's abrupt permit revocation, Agripost's contract with the County to operate the facility was rendered worthless and it lost its lease (forfeiting all the facilities it had built).

Exhausting its administrative remedies, Agripost unsuccessfully sought review of the County's action in Florida's courts.

Agripost then sued in U.S. District Court for redress of its federal constitutional rights but was, pursuant to settled 11th Circuit policy, told to first ripen its case in state court by seeking recompense under state law. In the process, the District Court rejected the County's defenses that the state administrative proceedings (including court review) were either res judicata or collateral estoppel. (App. D.) The *County* then sought 11th Circuit

review, even though it had prevailed and the case had been dismissed. The basis for its appeal was that the District Court's decision would deny it the ability to invoke either claim or issue preclusion. The 11th Circuit affirmed. (App. C.)

Upon litigating in state court as ordered (and losing), Agripost returned, only to have its second federal suit dismissed on the basis of claim preclusion. (App. B.) The 11th Circuit affirmed, concluding that, although claim preclusion did not apply, the matter was barred by issue preclusion. (App. A.)

The 11th Circuit's treatment of *San Remo* is unfathomable. Acknowledging that *San Remo* "was an *issue* preclusion case" (App. p. 13 [emphasis, the court's]), the 11th Circuit said that "we need not extrapolate from the holding in *San Remo* to decide this appeal" (App. p. 13), and then held that issue preclusion controlled without further mention of this Court's issue preclusion analysis in *San Remo*.

Nor did the 11th Circuit deal at all with the impact of its own *Fields* rule and its direct order to Agripost to litigate in state court in order to ripen its federal claim and then return to federal court to litigate its federal issues.

Moreover, having held in the first appeal that the County could not apply either claim or issue preclusion based on the state court findings (App. C), the 11th Circuit allowed the County to do precisely that (App. A).

Rehearing was denied. (App. G.) Thus, this Petition.

BASIS FOR GRANTING THIS WRIT OF CERTIORARI

I.

THERE IS CONFLICT AND CONFUSION REGARDING THE ABILITY OF PROPERTY OWNERS TO SUE MUNICIPALITIES IN FEDERAL COURT FOR 5TH AMENDMENT VIOLATIONS. THREE DECISIONS OF THIS COURT INTERTWINE TO PERPETUATE THE CONFUSION.

First. In *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985), this Court held that a property owner's 5th Amendment claim to just compensation for a regulatory taking was not "ripe" for federal court litigation until litigation under parallel state constitutional provisions had been tried and lost.

Second. In *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), this Court held that a municipal defendant could remove such a 5th Amendment claim from state court for federal litigation. The opinion does not cite *Williamson County* nor the fact that *Williamson County*'s holding renders compliance with 28 U.S.C. § 1441(a) (i.e., that a case can be removed only if it could have been brought in federal court in the first instance) impossible.

The upshot of *Williamson* and *City of Chicago* is that property owners are barred from filing takings claims in federal court, but municipalities have the absolute right to try such claims in federal court by removing them.

Third. In *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323 (2005), this Court held that, once a case is brought and tried in state court, issue preclusion would prevent prosecuting such a case in federal court, even though the state court litigation had completed the required *Williamson County* ripening — rendering the matter theoretically ready for federal court litigation.

By the time *San Remo* was decided, members of this Court openly questioned the continuing validity of *Williamson County*. The *San Remo* plaintiff did not challenge

Williamson County, instead assuming that it could follow the direction of that case to return to federal court with its then-ripened 5th Amendment claim. As *Williamson County* was not challenged in this Court, the Court simply assumed it was still valid precedent. The late Chief Justice, however, joined by Justices O'Connor, Kennedy, and Thomas, filed a concurring opinion directly asking for such a reconsideration of a ruling they had come to believe "may have been mistaken" (*San Remo*, 545 U.S. at 348):

> "I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. . . . In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts." (*San Remo*, 545 U.S. at 352 [concurring opinion].)

A.

Williamson County Contained a Fatal Flaw: It Wrongly Assumed That a Fifth Amendment Taking Without Just Compensation is Not Complete Until a State Court Adjudicates That the Local Agency Really Will Not Pay.

The 5th Amendment's Just Compensation Clause (the first element of the Bill of Rights incorporated into the 14th Amendment's Due Process Clause)[2] prohibits government from taking private property for public use unless it pays just compensation. A violation of that provision occurs as soon as government action takes private property and the municipality fails or refuses to pay. (See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316-317 [1987].) There is nothing in either logic or the language of the 5th Amendment to require state court certification of non-payment before the taking is complete.

That is *Williamson County*'s flaw: it held that the taking was not complete until

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[2] *Chicago B.& Q. R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

compensation was denied not just by the taking entity, but also by the state courts.

Williamson County quite properly began its analysis with the words of the 5th Amendment, noting that the constitutional provision "does not proscribe the taking of property; it proscribes taking without just compensation." (473 U.S. at 194.) The problem arises because the Court then blurred the distinction between acts of the *agency* that actually committed the taking and the *State* that may or may not have provided compensation through litigation. (473 U.S. at 195-196.)

But the *state* is not involved in 42 U.S.C. § 1983 cases like this one. States and their officials cannot be sued under Section 1983 (*Will v. Michigan Dept. of Police*, 491 U.S. 58 [1989]), nor (with very narrow exceptions [*Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003)]) can they be brought into federal court at all against their will (U.S. Const., 11th Amendment). The real issue in cases like this is whether the local entity — like Miami-Dade County at bench — is alleged to have taken private property for public use (i.e.,

in pursuit of a public purpose[3]) and failed to pay for it. If so, the question whether the municipality can be *compelled* to pay lies at the heart of litigation in either state or federal court.

The crux of the problem with *Williamson County* is that it *merged the state legal system with the local agency defendant* and disregarded the plain words of the Constitution. Nothing in the 5th Amendment requires multiple litigation or state court deference. It does not say ". . . nor shall private property be taken for public use without just compensation *as finally determined by suing the municipal defendant in state court.*"[4]

The issue is not whether a state has countenanced the constitutional violation, but whether the municipal defendant has

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[3] *Kelo v. City of New London*, 545 U.S. 469, 480 (2005).

[4] Indeed, when adopted, the 5th Amendment applied only to the federal government The 14th Amendment applied its precepts to the states, but there have been no developments in constitutional law suggesting that this provision has been *de facto* amended to exclude the federal courts from enforcing it.

committed it. 42 U.S.C. § 1983 forbids any person, including municipalities (*Monell v. Dept. of Social Services*, 436 U.S. 658, 690 [1978]), acting under color of state law from violating rights secured by federal law. The gravamen of a 5th Amendment claim is a taking of property[5] and nonpayment by the taker. When a municipal council — like Miami-Dade's — takes private property without providing any compensation, it violates the 5th Amendment then and there. The presence or absence of a state remedy has no bearing on whether the malefactor did the deed. (*Monroe v. Pape*, 365 U.S. 167, 183 [1961] ["It is no answer that the state has a law which if enforced would give relief."])

A year after *Williamson County*, the Court seemed to understand this, explaining *Williamson County* as being based on the premise that "a court cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation *the responsible administrative body intends to provide*." (*MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350

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[5] Per *U.S. v. General Motors Corp.*, 323 U.S. 373, 378 (1945), it is the deprivation of the owner, not the accretion of any interest to the taker, that constitutes the compensable taking.

[1986]; citation omitted; emphasis added.) At another point, the same opinion speaks of determining "if *proffered* compensation is 'just.'" (477 U.S. at 350; emphasis added.) Neither formulation requires state court litigation. If needed, a simple inquiry can answer questions of "intent" and "proffer."[6]

After saying that in *MacDonald*, the Court again explained *Williamson County* as holding that "an illegitimate taking might not occur *until the government refuses to pay*" (*First English*, 482 U.S. at 320, fn. 10; emphasis added), without any reference to whether a state court had refused to *order* payment. In any event, if a city refuses to provide compensation as required by the U.S. Constitution and recourse to the courts must be had, there is no reason why such recourse should — let alone must — be had only in *state* courts when the *federal* constitution is being violated. (*McNeese v. Board of Education*, 373 U.S. 668, 674, n. 6 [1963] ["we have not the right to decline the exercise of . . . jurisdiction simply because the rights asserted may be adjudicated in some other forum."])

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[6] Cf. *Jacobs v. United States*, 290 U.S. 13, 16 (1933): "A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the [5th] Amendment."

Deferring to state courts is tantamount to granting states a veto power over access to federal court, making them *de facto* federal court gatekeepers. The Court has repeatedly concluded that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." (*Felder v. Casey*, 487 U.S. 131, 144 [1988], quoting *Wilson v. Garcia*, 471 U.S. 261, 269 [1985].)

Mandating suit in state court imports into the 5th Amendment an unwarranted remedial requirement when the just compensation language is a self-executing limitation on government's inherent power. (*First English*, 482 U.S. at 315.) [7]

If nothing else, any required state court suit for payment is not only inconsistent with 42 U.S.C. § 1983 (*Patsy v. Board of Regents*,

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[7] See also Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century Just Compensation Law*, 52 Vand. L. Rev. 57, 60-61 (1999); J. David Breemer, *Overcoming* Williamson County's *Troubling State Procedures Rule*, 18 J. Land Use & Envtl. L. 209, 219-225 (2003).

457 U.S. 496, 503 [1982]), but also with Congressional policy established in the Uniform Relocation Assistance and Real Property Acquisition Policies Act, which provides that it is illegal for government agencies to make it necessary for property owners to sue for just compensation. (42 U.S.C. § 4651[8].) Rather, the duty is the government's to acquire whatever property interests are needed for the public good, either by negotiation (42 U.S.C. § 4651[1]) or condemnation (42 U.S.C. § 4651[8]). State laws track these provisions. (See Fla. Stat. § 421.55)

In any event, if suit is required to demonstrate the actuality of a 5th Amendment violation, there is nothing in the 5th Amendment directing that the *only* place to seek that determination is in *state* court. As state and federal courts have concurrent jurisdiction to decide constitutional claims, the choice of forum, as in other cases, should belong in the first instance to the plaintiff.[8]

No other constitutional rights are treated that way. Just as the Constitution forbids

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[8] *Bell v. Hood*, 327 U.S. 678, 681 (1946): "a party who brings a suit is master to decide what law he will rely upon."

taking property, but only without just compensation, so the Constitution forbids the deprivation of life and liberty — but only if done without due process of law: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." And yet, plaintiffs complaining about deprivations of life or liberty without due process of law are not told they must first sue in state courts to determine whether relief can be had there, as a precondition to seeking redress in federal court. Quite the contrary. Their suits take place in federal court; the validity of the defendant's actions under state law, and the availability of state remedies is irrelevant. (See *Monroe v. Pape*, 365 U.S. 167 [1961] [police brutality case not required to be preceded by state tort suit for assault and battery]; *Felder v. Casey*, 487 U.S. 131, 148 [1988] [Section 1983 suits are enforceable in federal court "in the first instance"].)[9]

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[9] The lone exception is habeas corpus, where by statute all issues (state and federal) must be raised in state court first. (28 U.S.C. § 2254[b].) However, once done, a habeas petitioner is not subjected to res judicata, collateral estoppel, or full faith and credit barriers upon arriving in federal court. The issues may be argued afresh. (See, e.g, *Wainwright v. Sykes*, 433 U.S. 72, 80 [1977].)

As the *San Remo* group of concurring Justices concluded, *Williamson County* contains no principled explanation of "why federal takings claims in particular should be singled out to be confined to state court . . ." (545 U.S. at 351.) Viewing litigation to protect federal rights as a whole, the *San Remo* concurrence put its finger on the right issue:

> "The Court has not explained why we should hand authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings, while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the *First Amendment* [citations]." (545 U.S. at 350; emphasis, the Court's.)

If, as *Williamson County* said, the federal violation is not ripe until a *state court* verifies that state law provides no remedy, then *all* Section 1983 litigation would have to begin in state courts. In the words of the leading treatise, "If there is a reason why free speech cases are heard by federal judges with alacrity and property rights cases receive the treatment indicated above [i.e., diversion to state courts], it is not readily discernible from the

Constitution." (Steven J. Eagle, Regulatory Takings 1070 [2d ed. 2001].)

There is no need to sue in State court merely to confirm the self-evident fact of non-payment of just compensation. The non-payment is obvious; it is the reason for the suit. Had there been payment, there would be no litigation. The Agripost litigation has been on-going for some 15 years. The County has made no offer of payment, flouting federal law in the all too evident belief that state courts will not enforce the Takings Clause and the preclusion rule will bar the owners from federal court.[10]

This can be seen in any regulatory taking case. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), for example, the taking occurred in 1986, the case was furiously litigated, through two appeals to the 9th Circuit and one trip to this Court. That

[10] Such a result is plainly contrary to the intent of the Congress that adopted 42 U.S.C. § 1983 and this Court's consistent application of it. As *Patsy* concluded after exhaustive study of the statute's adoption, Congress had a general "mistrust" of the "local prejudice" in state courts and therefore intended "to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . ." (457 U.S. at 503.)

process consumed 13 years. At no time — even after a jury trial resulted in a compensatory judgment — did the city volunteer to pay anything. Suit was not necessary to determine the lack of compensation, or the city's lack of interest in paying.

Nor is a state suit needed to inform the defendant of the problem. Given the complexity of today's land use procedures — usually requiring years of effort and endless public hearings before action is taken — any agency that is not comatose is well aware by the end of the process that the property owner claims the city action violates the 5th Amendment. Miami-Dade was not in doubt about that claim. It simply chose not to honor it. Imposing on Agripost (not to mention the time of the state courts) merely to confirm that obvious fact serves no legitimate purpose.

With respect, *Williamson County* erroneously construed the 5th Amendment to require a wasteful detour through state courts as a precursor to federal court litigation of a core federal constitutional issue. As shown in *San Remo*, lower court efforts to grapple with this rule, attempting to apply it while also giving deference to general rules of preclusion, have created only chaos. It is time for this Court to acknowledge the original error,

overrule the state court ripening requirement, and allow Agripost the day in federal court that it initially sought and to which it was entitled *ab initio*.

B.

City of Chicago, Rendered a Dozen Years After *Williamson County*, Added Further Confusion to the "Ripeness" Procedure in Takings Cases.

In *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), the property owner did as instructed by *Williamson County*: it filed a state court action challenging the validity of land use regulations. In addition to state court claims, the complaint raised federal due process, equal protection and takings claims. (See 522 U.S. at 160.)

The Court held that it was proper for the municipal defendant to remove the case to federal court under 28 U.S.C. § 1441(a). Section 1441(a) permits removal *if, but only if*, the plaintiff could have brought suit in federal court in the first place, but chose not to.

It somehow got overlooked that, as a land use plaintiff, the International College of

Surgeons could *not* have sued the City of Chicago in federal court; *Williamson County* forbade it. Nonetheless, the Court held removal was proper because "a case containing claims that local administrative action violates federal law . . . is within the jurisdiction of federal district courts." (522 U.S. at 528-529.) The Court added that "the facial and as-applied federal constitutional claims raised by ICS 'arise under' federal law for purposes of federal question jurisdiction." (522 U.S. at 167-168.)

Justice Ginsberg's dissent emphasized *City of Chicago*'s momentous nature, characterizing the decision as both a "watershed" (522 U.S. at 175) and a "landmark" (522 U.S. at 180), because:

> "After today, litigants asserting federal-question or diversity jurisdiction may routinely lodge in federal courts direct appeals from the actions of all manner of local (county and municipal) agencies, boards, and commissions." (522 U.S. at 175; Ginsberg, J., dissenting.)

City of Chicago demonstrates the error in *Williamson County*. Unburdened by being

reminded of *Williamson County*,[11] the Court accurately and sensibly concluded that 5th Amendment cases are properly brought in federal court in the first instance.

Precedents are not cast away lightly. However, when scholars have been critical of its decisions,[12] when application of a precedent has produced a rule that "stands only as a trap for the unwary,"[13] when necessary to clarify the implications of earlier decisions,[14] when decisions of the Court are "if not directly . . .

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[11] In fairness to the Court, the adversary system seems to have failed. Neither of the parties to *City of Chicago* cited *Williamson County*, and only one amicus brief even mentioned it (and that one only tangentially), so the Court was uninformed about the full consequences of its actions.

[12] *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 48 (1977).

[13] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

[14] *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967).

[conflicting,] are so in principle,"[15] or when "the answer suggested by [the Court's] prior opinions is not free of ambiguity,"[16] the Court has reviewed its earlier decisions and corrected its own errors. Each of those factors applies to *Williamson County*.

C.

San Remo Added to the Confusion by Applying *Williamson County* Despite Concerns About its Validity.

By the time *San Remo* reached this Court, the plaintiff had several strikes against it. First, plaintiff filed suits in both state and federal court and then stayed the state court action. The District Court held that the federal case was both untimely (facial claim) and unripe (as applied claim). On appeal, plaintiff asked the court to abstain from considering its own case, pending resolution of the state court litigation, a request that the 9th Circuit granted as to the facial claim, but agreed with the District Court that the as applied claim was

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[15] *Funk v. U.S.*, 290 U.S. 371, 374 (1933).

[16] *McDaniel v. Sanchez*, 452 U.S. 130, 136 (1981).

unripe. Second, the plaintiff purported to file a "reservation of federal issues," notwithstanding that the 9th Circuit (unlike the 11th Circuit) had no established policy regarding such reservations. (See *Dodd v. Hood River County*, 136 F.3d 1219 [9th Cir. 1998], applying issue preclusion notwithstanding that the state court honored the property owner's reservation of federal issues.) Third, when the state suit was decided, the California Supreme Court acknowledged that a reservation had been filed, but nonetheless analyzed decisions of this Court in ruling on the merits. Fourth, when it sought certiorari here, the plaintiff did not challenge *Williamson County*. Finally, when this Court decided *San Remo*, it was on the assumption that *Williamson County* was still good law because it had not been challenged.

This Court was thus able to review the result in *San Remo* as though *Williamson County* was etched in stone. In that light, *San Remo* simply examined the question whether application of *unchallenged* law by a state court was entitled to full faith and credit. The Court found the answer to that question obvious.

In the context of *Williamson County*, however, that obvious result only added to the confusion. While *San Remo* held that the result of a regulatory taking case tried in state

court would be entitled to full faith and credit in federal court, it left unanswered the question whether the litigation *had* to be filed in state court to begin with. *Williamson County* said that it did, but four Justices voiced grave concern about that conclusion in *San Remo*, and the Court held that it did not in *City of Chicago*.

The upshot is that the law is in hopeless disarray, heavily criticized by the scholarly community and lower courts as well. (E.g., *Dodd v. Hood River County*, 59 F.3d 852, 861 [9th Cir. 1995] ["**draconian**"]; *Fields*, 953 F.2d at 1307, n.8 ["**odd**"]; Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Report 17 at 27 [1997] ["**shocking**"]; Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. West. L. Rev. 1, 51 [1992] ["**Kafkaesque**"]. A collection of dozens of other such critical descriptions of *Williamson County* may be found in Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urban Lawyer 671, 702-703 [2004].)

As the confusion is the result of the adoption and interaction of this Court's own decisions, any resolution must come from this Court. (E.g., *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 [8th Cir. 2003] [calling the dissonance between *Williamson County* and *City of Chicago* an "anomalous gap in Supreme Court jurisprudence" whose resolution "is for the Supreme Court to say, not us."].)

The decision in *San Remo* only added to the confusion containing, as it did, the strong analysis of four Justices that *Williamson County* was erroneously decided and ripe for overruling, but failing to reach the issue because the parties did not raise it.

It is time to end the confusion.

II.

THE 11TH CIRCUIT'S "SETTLED RULE" OF REMANDING TAKINGS CASES TO STATE COURT FOR *WILLIAMSON COUNTY* "RIPENING" MANDATES ALLOWING THIS CASE TO PROCEED.

Agripost was directly ordered by the District Court and the 11th Circuit — following the "settled rule" of the 11th Circuit — to depart from the federal courts and litigate ***first*** in the

state courts. Pursuant to that settled 11th Circuit rule, Agripost was told that it could "reserve" its federal issues for federal court litigation.

The 11th Circuit's *Fields* rule was the effort of a lower court to find a way to reconcile this Court's *Williamson County* rule with the settled jurisdiction of federal courts to decide federal questions presented to them.

Williamson County was clear that after state court ripening, federal litigation could proceed. (E.g., 473 U.S. at 185 [federal claim is "premature"]; 473 U.S. at 186 [federal claim "is not ripe"]; 473 U.S. at 194 ["not yet ripe"]; 473 U.S. at 197 ["until [plaintiff] has used that [state] procedure, its taking claim is premature"].) The 11th Circuit thus created a procedure in its *Fields* decision to implement both the perceived intent and the plain language of *Williamson County*, and it adhered to that procedure consistently.

This case thus differs from *San Remo* in significant ways.

First. Unlike the 11th Circuit, the 9th Circuit had no established rule dealing with *Williamson County*.

Thus, Agripost was trapped by the settled law of the 11th Circuit into litigating in the state courts, with the promise of eventual federal court litigation thereafter. The San Remo Hotel, by contrast, was litigating in the 9th Circuit, where the Court of Appeals had already said that it would apply issue preclusion to takings cases that had obtained a state court decision. (See *Dodd v. Hood River County*, 136 F.3d 1219 [9th Cir. 1998].) When this Court applied issue preclusion in *San Remo*, it was only doing what the 9th Circuit would have done in any event. That differs sharply from Agripost's treatment in the 11th Circuit. Recall that, as noted in the opinion below, the *Fields* rule had "become the settled law in this circuit." (App. p. 10.)

Second. There was no order there from a U.S. Circuit Court of Appeals — as there is here — refusing to allow a federal suit to proceed *until after* the property owner sued first in state court *and* reserved the right to litigate any federal issues in federal court.

Third. Agripost has filed this Petition directly challenging the continuing validity of *Williamson County*.

Because of the 11th Circuit's settled application of the *Fields* rule, this case should

not be bound by *San Remo*. This case was initially brought in federal court, and there it should have stayed. Applying *Fields*, however, the 11th Circuit directly ordered Agripost to take its case to state court. Although Agripost told the state courts it was reserving its federal issues, and those courts acknowledged as much, the 11th Circuit later held that issue preclusion attached. Thus, unlike all other plaintiffs claiming sundry violations of their *federal* constitutional rights, Agripost finds itself unable to seek relief for the violation of its federal rights in *any* court.

This much is clear: But for the 11th Circuit's order, *there would have been no state court decision* that could have functioned in an issue preclusive manner. If the 11th Circuit, in the absence of *Fields*, had determined that the matter was not ripe, Agripost could have sought review here. As it was, the law of the Circuit was settled, and it promised access to federal court. Delayed, but not denied. There was no need to question that process, so Agripost did as it was ordered to do.

Agripost is a litigational victim of a system deliberately constructed by the 11th Circuit to deal with applications of this Court's *Williamson County* decision. These things seem clear: (1) *Williamson County* needs to be

reviewed and (as to its state court litigation prong) disapproved; (2) because Agripost was following the direct orders of the 11th Circuit in submitting to state court jurisdiction — but without submitting its federal claims there — it should not suffer the loss of the federal forum it legitimately chose to litigate its federal claim.

CONCLUSION

Williamson County's requirement of ripening 5th Amendment takings claims in state court, as it has been applied during more than two decades, has been a nightmare. It has caused needless anguish to property owners like Agripost. It has caused wastefully repetitive litigation for state and federal court systems. And it has created a field day for criticism by lower courts and commentators.

Citizens, lawyers, and — particularly — busy trial judges are concerned with the law's application, i.e., its nuts and bolts. They lack the luxury of being able casuistically to parse words and theories and attempting to fit unfamiliar concepts like *Williamson County*'s state court ripeness rule into a matrix that already includes rules of claim and issue preclusion with which industrious trial judges work on a daily basis.

It is time to call a halt to the pointless, and plainly unintended, game playing to which property owners have been subjected. They have become the shuttlecocks of constitutional litigation, subject to dismissal under *Williamson County* if they dare to file in federal court, but subject to removal under *City of Chicago* if they file in state court and their municipal opponents would prefer a federal forum. Finally, they are subject to loss of access to federal courts altogether under *San Remo* if they follow the letter of *Williamson County* and seek (or, as in this case, are ordered to seek) to ripen their federal claims in state court before coming to federal court. Rights created and protected by the Constitution deserve better.

Williamson County's state court litigation requirement needs to be overruled. It has become a jurisprudential poison pill, precluding determination of federal constitutional issues, rather than enabling meaningful decision.

Because of the established 11th Circuit procedure with which Agripost complied, any overruling of *Williamson County* in this case ought to apply to Agripost. Agripost was trapped by a pair of interlocking cases created by this Court and the 11th Circuit — *Williamson County* and *Fields* — which combined to force its litigation into the Florida

courts. None of that ever should have taken place. If the *Williamson County* rule requiring state court litigation is undone here, Agripost ought to be one of its beneficiaries.

Petitioner prays that certiorari be granted.

Respectfully submitted,

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-16499

D.C. Docket No. 04-21743-CV-JEM

AGRIPOST, LLC a Florida Limited Liability Company, (successor by merger to Agripost, Inc.), AGRI-DADE, LTD., a Florida limited partnership,

Plaintiffs-Appellants,

versus

MIAMI-DADE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(April 22, 2008)

Before TJOFLAT, HULL and BOWMAN,* Circuit Judges.

TJOFLAT, Circuit Judge:

I.

The facts giving rise to this case are more fully documented in this court's prior opinion from the last round of this litigation, and we will not recount them all here. *See generally Agripost v. Miami-Dade County,* 195 F.3d 1225 (11th Cir. 1999). For present purposes, it suffices to sketch the basics of the controversy. Agripost LLC and Agri-Dade, Ltd. are successors in interest to Agripost, Inc. (collectively "Agripost"), which had subleased a plot of publicly owned land from Dade County, Florida ("the County") in 1986 for the purposes of constructing and operating a waste-disposal plant that could convert waste into agriculturally useful compost. One of the conditions of the sublease was that Agripost obtain and maintain an unusual use zoning permit because the land was zoned only for agricultural use. The sublease was also conditioned on Agripost's continuing use of the land for the described waste-conversion plant.[1] Agripost made a proposal to the Dade County

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* Honorable Pasco M. Bowman II, United States Circuit Judge for the Eighth Circuit, sitting by designation.

[1] The lease provides in relevant part: "[T]he lease agreement shall be terminated at the option of the Lessor when and if the said premises including land and improvements shall cease

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zoning authority, received a conditional unusual use permit, constructed the plant, and began operating it in 1989. One of the conditions of the unusual use permit is that Agripost "compl[ies] with all conditions and requirements of the Department of Environmental Resources Management."

Within a year, however, the plant began having problems with odor emissions. After a hearing the County's Department of Environmental Resource Management revoked the unusual use permit because it deemed the plant's continued operation a public nuisance. This decision was upheld by the Zoning Appeals Board and then the County Commission. Without the unusual use permit, Agripost's lease on the land was terminated on its own terms.

Agripost challenged the County's decision to revoke the permit before a panel of the Dade County Circuit Court that handles administrative appeals. The panel affirmed the agency's decision after concluding that Agripost violated the terms of the conditional permit when it failed to reduce the noxious fumes generated by the plant's operation. Agripost sought but was denied review of the case by the Florida Third District Court of Appeal.

After this first go-around in state court, Agripost brought suit against the County in the United States

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to be used for a resource recovery facility. The Lessee shall upon termination surrender the premises."

District Court for the Southern District of Florida, alleging that the revocation of the unusual use permit amounted to a regulatory taking without just compensation as required by the Fifth Amendment's Takings Clause.[2] The district court dismissed the complaint for lack of ripeness under the doctrine of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). In *Williamson County,* the Supreme Court held that a federal constitutional takings claim is not ripe until the plaintiff has unsuccessfully pursued a compensation claim in state court. *Id.* at 195, 105 S. Ct. at 3121. We affirmed the dismissal on ripeness grounds. *See Agripost,* 195 F.3d at 1233-34.

Agripost then sued the County in the Dade County Circuit Court, seeking damages based on, among other state law claims, inverse condemnation, alleging that the permit revocation deprived it of all economically viable use of the property. The complaint also sought damages under the Fifth Amendment's Takings Clause but expressly reserved the right to litigate this federal claim in federal court at the conclusion of the circuit court proceedings, as this court, in *Fields v. Sarasota Manatee Airport Authority,* 953 F.2d 1299 (11th Cir. 1992), held that litigants

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[2] The Fifth Amendment's Takings Clause is applicable to the states under the Fourteenth Amendment's Due Process Clause. *See Palazzolo v. Rhode Island,* 533 U.S. 606, 617, 121 S. Ct. 2448, 2457, 150 L. Ed. 2d 592 (2001).

in Agripost's position could do. The circuit court granted the County's motion for summary judgment on all counts of the complaint, and the Third District Court of Appeal affirmed. On the inverse condemnation claim, that court held that because Agripost's property interest in the particular use, i.e., as a waste disposal facility, was conditional, Agripost did not have a property interest protected by either the state or federal constitutions against a revocation of the use permit once the County determined that Agripost was in violation of the permit's conditions. The Florida Supreme Court denied certiorari review.

Agripost thereafter returned to the federal district court, re-filing its Fifth Amendment regulatory takings claim. Agripost alleged that by revoking the conditional use permit and causing the plant to cease operations, the County deprived it of all economically beneficial use of the property without compensation. This time, the district court granted the County's motion for summary judgment on the grounds that the federal takings claim was barred by res judicata or claim preclusion as a result of the disposition in Agripost's state court suit. The court also held that Agripost's claim is barred by collateral estoppel or issue preclusion. This appeal followed.

II.

A.

We review the district court's summary judgment order *de novo,* applying the same standard as the

district court, viewing all evidence in the light most favorable to the nonmoving party, in this case Agripost. *See Custom Mfg. & Eng'g, Inc. v. Midway Servs., Inc.*, 508 F.3d 641, 646-47 (11th Cir. 2007).

Claim and issue preclusion are familiar legal doctrines, though they generate more than their fair share of complexity in application. One area in which they have been particularly troublesome is in takings cases brought in federal court after *Williamson County*. *Williamson County* boils down to the rule that state courts always have a first shot at adjudicating a takings dispute because a federal constitutional claim is not ripe until the state has denied the would-be plaintiff's compensation for a putative taking, including by unfavorable judgment in a state court proceeding. Once that occurs, and the plaintiff repairs to the federal district for compensation under the Fifth Amendment's Takings Clause, the plaintiff faces the possibility that the legal or factual issues resolved by the state court might have preclusive effect under the Full Faith and Credit statute, 28 U.S.C. § 1738.[3] In short, the interaction of § 1738 and

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[3] The statute reads in relevant part:

> The records and judicial proceedings of any court of any . . . State, Territory or Possession, . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

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Williamson County might deprive the plaintiff of the chance to litigate his Takings Clause claim in a federal forum, unless there were some exception to the general principles of preclusion encapsulated in § 1738.

In *Fields,* we held that a plaintiff who involuntarily litigates in state court because of the rule of *Williamson County* can make an express reservation of his Takings Clause claim as an exception to the state law claim preclusion principles that would apply under § 1738. *See Fields,* 953 F.2d at 1306. That decision was based in large part on the opinion of our predecessor court in *Jennings v. Caddo Parish School Board,* 531 F.2d 1331 (5th Cir. 1976) (per curiam) (stating in dicta that plaintiff could have made an express reservation of her federal constitutional claim in state court in order to avoid claim and issue preclusion).[4] The *Fields* panel recognized the

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28 U.S.C. § 1738. Thus, federal courts apply the preclusion law of the state whose courts rendered the first decision, *see Cmty. Bank v. Torcise,* 162 F.3d 1084, 1086 n.5 (11th Cir. 1998), which in this case is the law of Florida.

[4] This court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981. *See Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). In *Jennings,* a former public school teacher unsuccessfully sued the school board in state court alleging that her termination was racially discriminatory and therefore denied her equal protection of the laws in violation of the Fourteenth Amendment. The district court held that because the plaintiff alleged in the state case that the firing was racially motivated and the state court rejected her claim on the merits,

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tension between permitting claim-splitting in the takings context, as authorized by *Jennings,* and the well-established rule of *Allen v. McCurry,* 449 U.S. 90, 101, 103-04, 101 S. Ct. 411, 419, 66 L. Ed. 2d 308 (1980), interpreting § 1738 to give prior state court adjudications of federal constitutional issues preclusive effect in federal courts. *See Fields,* 953 F.2d at 1303-04. Under the Court's interpretation of § 1738, state claim preclusion law that disallows separating and reserving the Takings Clause claim from the litigation of state law claims would be given full effect in federal court and would seem to rule out the kind of reservation discussed in *Jennings.*

Nonetheless, the *Fields* panel held that *Allen* did not implicitly overrule *Jennings* and did not prevent plaintiffs from reserving their Takings Clause claims. The panel analogized Fields's situation to that of a plaintiff forced into state court when a federal court invokes the *Pullman* abstention doctrine, *R.R. Comm'n of Tex. v. Pullman Co.,* 312 U.S. 496, 498-502, 61 S. Ct. 643, 644-46, 85 L. Ed. 971 (1941), and abstains from deciding the case. In *Pullman* abstention cases, i.e., cases in which the federal courts have subject

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res judicata barred her relitigation of the equal protection claim in federal court. *Jennings v. Caddo Parish Sch. Bd.,* 531 F.2d 1331, 1331-32 (5th Cir. 1976). The panel on appeal held that the plaintiff could have but failed to make an express reservation of her federal claim on the record in the state court proceeding, as provided by *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 421-22, 84 S. Ct. 461, 468, 11 L. Ed. 2d 440 (1964), and therefore affirmed. *Jennings,* 531 F.2d at 1332.

matter jurisdiction but relinquish it to enable the state courts to resolve antecedent state law issues that could moot the need for further proceedings in the federal case, the Supreme Court has held that the state court plaintiff may expressly reserve her federal claims so that the state court does not reach beyond the state law issues. *England v. La. State Bd. of Med. Exam'rs,* 375 U.S. 411, 421-22, 84 S. Ct. 461, 468, 11 L. Ed. 2d 440 (1964). To be sure, the plaintiff in a *Pullman* abstention case already has a ripe federal claim whereas the plaintiff in a takings case, per *Williamson County,* does not. Although *Jennings* expanded the scope of the reservation beyond the boundaries originally drawn in *England, see Fields,* 953 F.2d at 1305, the *Fields* panel harmonized *Jennings*'s broad application with the Supreme Court's interpretation of § 1738. *See Migra v. Warren City Sch. Dist. Bd. of Educ.,* 465 U.S. 75, 85 n.7, 104 S. Ct. 892, 898 n.7, 79 L. Ed. 2d 56 (1984); *Fields,* 953 F.2d at 1305-06 & nn.5-7.

Much of the basis for reaffirming *Jennings*'s continued validity relies on dicta in footnote seven of *Migra. Migra* addressed the claim-preclusive effects of a prior state court adjudication in which the federal plaintiff had also been the state court plaintiff. *Migra,* 465 U.S. at 77, 104 S. Ct. at 894. The alignment of the parties is similar to the alignment in *Fields,* and unlike *Allen,* both *Migra* and *Fields* addressed claim preclusion and not issue preclusion. Footnote seven in the Court's opinion strongly suggests that the voluntariness of the plaintiff's presence

in state court determines whether the plaintiff can reserve a federal claim for federal court later.[5] *See id.* at 85 n.7, 104 S. Ct. at 898 n.7 ("In the event that a § 1983 plaintiff's federal and state-law claims are sufficiently intertwined that the federal court abstains . . . the plaintiff can preserve his right to a federal forum for his federal claims. . . ."). Thus, the *Fields* panel reasoned that permitting the reservation of a federal takings claim when the plaintiff litigates in state court due to *Williamson County* is sufficiently consistent with the post-*Migra* interpretation of § 1738 because the plaintiff is in state court involuntarily. *Fields*'s gloss on the *Jennings* reservation has since become the settled law in this circuit. *See, e.g., Bauknight v. Monroe County,* 446 F.3d 1327, 1330-31 (11th Cir. 2006); *Saboff v. St. John's River Water Mgmt. Dist.,* 200 F.3d 1356, 1360 (11th Cir. 2000).

The County argues that a recent Supreme Court decision, *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005), rejects the availability of an *England/Jennings* reservation of federal takings claims in situations like the present case. The litigation culminating in *San Remo Hotel* resembles this

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[5] Of course, this voluntariness matters only when the litigant is the plaintiff in both forums. A state court criminal defendant is clearly not voluntarily in state court, yet the state court's decisions on federal constitutional issues are preclusive in federal court. *See Allen v. McCurry,* 449 U.S. 90, 101, 103-04, 101 S. Ct. 411, 419, 66 L. Ed. 2d 308 (1980).

case not only in the legal issues raised but also in the tangled procedural history spanning state and federal courts. *San Remo Hotel* began in California state court when the plaintiff property owner sought review of the imposition of a "conversion fee" by the City and County as a condition of permitting the plaintiff's proposed transformation of a low-rent residential building into a tourist hotel. *See id.* at 329, 125 S. Ct. at 2496. While the petition was pending, the plaintiff sued the City and County in federal district court alleging, among other claims, that the conversion fee violated the Takings Clause. The district court, following *Williamson County,* granted the defendants summary judgment as to the takings claim on the ground of ripeness. *Id.* at 330, 125 S. Ct. at 2497. The plaintiffs subsequently sued in state court raising only state law claims and reserving their Takings Clause claim by reference to *England. See id.* at 331 & n.6, 125 S. Ct. at 2497 & n.6. Throughout the course of the state court case, which went all the way to the California Supreme Court, the parties litigated and the courts decided the substance of federal constitutional issues in the form of the state law takings claim. Specifically, the constitutional issue was which standard governs the question of whether the government's conversion fee was a valid assessment in exchange for a building permit. *See id.* at 333, 125 S. Ct. at 2498-99. The California Supreme Court held that the lower standard applied and that the government's assessment was reasonable and therefore not a compensable taking. *Id.*

The plaintiff then re-filed its Takings Clause claim in the federal district court. The district court held, and the Ninth Circuit affirmed, that California issue preclusion law applies and that issues raised by plaintiff's federal constitutional claim were precluded because the California courts "had interpreted the relevant substantive state takings law coextensively with federal law." *Id.* at 335, 125 S. Ct. at 2500. The Supreme Court affirmed, holding that there is no exception to the application of issue preclusion as required by § 1738 and *Allen* for cases in which the plaintiff is forced to pursue compensation through litigating first in state court. *Id.* at 338, 125 S. Ct. at 2501-02. Moreover, the Court emphasized that *England* reservations are limited to cases in which there was proper federal jurisdiction prior to the invocation of *Pullman* abstention, in other words, when the "antecedent state issue requiring abstention was *distinct* from the reserved federal issue." *Id.* at 339, 125 S. Ct. at 2502.

Although the Supreme Court's reasoning in *San Remo Hotel* seems to undercut much of the support for *Jennings* and *Fields,* we need not decide now whether they have been implicitly overruled to the extent that they would permit the reservation of federal claims in non-*Pullman* situations. *See, e.g., Atlantic Sounding Co., Inc. v. Townsend,* 496 F.3d 1282, 1284 (11th Cir. 2007) ("[T]hat the reasoning of an intervening high court decision is at odds with that of our prior decision is no basis for a panel to depart from our prior decision."). *San Remo Hotel* was

not a *claim* preclusion case; it was an *issue* preclusion case, and because we need not extrapolate from the holding in *San Remo Hotel* to decide this appeal, we will not do so. Accepting *arguendo* that Agripost has successfully reserved its federal constitutional claim, we now consider whether it is nonetheless barred by issue preclusion from going forward with that claim.

B.

Florida issue preclusion doctrine forecloses relitigation if: (1) the parties are identical with those from the prior case, (2) the issues are identical, (3) there was a full and fair opportunity to litigate the issues and they were actually litigated, and (4) those issues were necessary to the prior adjudication. *See Dadeland Depot, Inc. v. St. Paul Fire and Marine Ins. Co.*, 945 So. 2d 1216, 1235 (Fla. 2006). Here, the parties are the same, the issues forming Agripost's state takings claim are the same as those involved in Agripost's federal takings claim, *see, e.g., Graham v. Estuary Props., Inc.*, 399 So. 2d 1374, 1380 (Fla. 1981),[6]

[6] Agripost argues that the Dade County Circuit Court's resolution of the same state and federal constitutional issue in this case, namely whether a conditional and revocable use permit can be revoked without effecting a taking, indicates that Florida takings law has taken a "novel approach" and diverged from federal takings law. However, the court consciously applied what it thought to be both the federal and state law on the issue. Moreover, in its state court appellate brief, Agripost argued that state takings law "is governed by *Lucas*[*v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d

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and the resolution of these issues was necessary for the state court's decision in favor of the County.

Agripost contends that it did not have a full and fair opportunity to litigate its state law takings claim because the court did not permit further discovery and relied exclusively on the extensive record created in the previous zoning litigation that ended in the revocation of Agripost's permit. This argument never leaves the hangar because the state court concluded, as a matter of law, that Agripost no longer had a protected property right in their nonconforming use given the administrative determination – upheld on judicial review – that Agripost had failed to comply with the terms of its conditional use permit.[7] *See*

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798 (1992)]," acknowledging that the state and federal law on the relevant takings issues are coextensive. The Third District Court of Appeal held that the federal and state law on this issue were the same. *See Agripost, Inc. v. Metropolitan Miami-Dade County,* 845 So. 2d 918, 920 (Fla. 3d Dist. Ct. App. 2003); *cf. Trafalgar Corp. v. Miami County Bd. of Comm'rs,* No. 06-3578, 2008 U.S. App. LEXIS 4475, at *6-7 (6th Cir. Mar. 3, 2008). Agripost's real gripe here is that the state court erred, but that of course is not a defense to collateral estoppel.

[7] Agripost contends that this conclusion is an impermissible application of collateral estoppel from the zoning litigation. It is not so. The zoning and state takings litigation addressed distinct issues: the former concerned whether the revocation was justified, *see Agripost v. Miami-Dade County,* 195 F.3d 1225, 1232-33 (11th Cir. 1999) (describing earlier zoning litigation), and the latter concerned whether given a justified revocation there was nonetheless a compensable taking of private property. *See Lake Lucerne Civic Ass'n, Inc. v. Dolphin Stadium Corp.,* 878 F.2d 1360, 1370-72 (11th Cir. 1989) (explaining the difference between the two concepts in Florida law). The Dade County

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Agripost, Inc. v. Metro. Miami-Dade County, 845 So. 2d 918, 920 (Fla. 3d Dist. Ct. App. 2003). Agripost argued to the state court that it still had a property right, even though it did not own the land in question and violated of the conditions of its lease when it lost the use permit, and the state courts rejected the argument. Nothing in that litigation rendered Agripost's opportunity to make its case insufficiently "full and fair";[8] Agripost is simply not entitled to discovery on claims lacking any legal basis, as the state court concluded. Florida preclusion law does not allow Agripost a second bite at the apple, and § 1738 does

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Circuit Court expressly rejected the County's argument that the zoning litigation had preclusive effect: "Now, while the prior litigation dealt with the propriety of the revocation, it didn't deal with the question of whether it constituted a taking." The court made a *de novo* ruling on the merits, concluding that because Agripost was *determined to have* violated the conditions of its unusual use permit – a fact that is undisputed – Agripost no longer had a valid, compensable property interest in that use, whether or not the violations amounted to a nuisance under other principles of Florida property law. *See Agripost v. Metro. Miami-Dade County,* 845 So. 2d at 920 (Fla. 3d Dist. Ct. App. 2003) (citing *Smalleylogics Corp. v. Dade County,* 176 So. 2d 574, 578 (Fla. 3d Dist. Ct. App. 1965)).

[8] Under Florida law, a full and fair opportunity to litigate an issue does not entail a full civil trial and its accouterments. *See E.I. DuPont de Nemours & Co., Inc. v. Melvin Piedmont Nursery,* 971 So. 2d 897, 898 (Fla. 3d Dist. Ct. App. 2007) (per curiam) (noting that collateral estoppel applies to judgment rendered as a sanction in prior litigation); *Paresky v. Miami-Dade County Bd. of County Comm'rs,* 893 So. 2d 664, 665 (Fla. 3d Dist. Ct. App. 2005) (per curiam) (finding full and fair opportunity in "quasi-judicial hearing" before County Commission).

not permit this court to second-guess the correctness of the Florida court's decision on the merits.[9] Because a state court of competent jurisdiction held that Agripost did not have a compensable property interest, its federal takings claim necessarily fails, and summary judgment for the County was proper.

III.

For the reasons stated herein, the judgment of the district court is

AFFIRMED.

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[9] In any event, it is sufficiently clear under Florida law that Agripost's use of the publicly owned land was "not part of [its] title to begin with," *Lucas,* 505 U.S. at 1027, 112 S. Ct. at 2899, because it did not own the land and because its use was deemed noxious. *See Marine One, Inc. v. Manatee County,* 898 F.2d 1490, 1492 (11th Cir. 1990) (stating that "it is clear from . . . Florida cases that revocation" of a use permit on publicly owned land "would not constitute a taking of property"); *Osceola County v. Best Diversified, Inc.,* 936 So. 2d 55, 59 (Fla. 5th Dist. Ct. App. 2006) ("The threshold issue on appeal is whether [plaintiff] was entitled to compensation from the County . . . when his request for a conditional use and permit were denied based on [a] determination [that] the facility was the cause of noxious odors and constituted a public nuisance. The answer is clearly no." (citing *Lucas*)).

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number:
04-21743-CIV-MARTINEZ-BANDSTRA

AGRIPOST, LLC, *et al.*,

Plaintiff,

vs.

MIAMI-DADE COUNTY,

Defendant. /

FINAL JUDGMENT

(Filed Oct. 21, 2005)

Pursuant to Fed. R. Civ. P. 56 and 58, and in accordance with the reasons stated in the Court's Order Granting Summary Judgment on **October 20, 2005**, judgment is entered in favor of the Defendant Miami-Dade County and against Plaintiffs Agripost, LLC and Agri-Dade, Ltd. This case is **CLOSED** and all pending motions are denied as **MOOT**.

DONE AND ORDERED in Open Court at Miami, Florida, this 21 day of October, 2005.

/s/ Jose E. Martinez
JOSE E. MARTINEZ
UNITED STATES
DISTRICT JUDGE

Copies provided to:
Magistrate Judge Bandstra
All Counsel of Record

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number:
04-21743-CIV-MARTINEZ-BANDSTRA

AGRIPOST, LLC, *et al.*,

Plaintiffs,

vs.

MIAMI-DADE COUNTY,

Defendant. /

ORDER GRANTING DEFENDANT MIAMI-DADE COUNTY'S MOTION FOR FINAL SUMMARY JUDGMENT

(Filed Oct. 20, 2005)

THIS CAUSE came before the Court upon Defendant Miami-Dade County's Motion to Dismiss with Prejudice or for Final Summary Judgment **(D.E. Nos. 21-1, 21-2)**, filed on October 8, 2004. This motion is fully briefed and ripe for adjudication. For the reasons set forth below, Defendant's Motion for Summary Judgment is granted and Defendant's Motion to Dismiss with prejudice is denied as moot.

I. Relevant Factual and Procedural Background

Plaintiffs allege that they entered into a contract with the County to build a solid waste composting

plant; however, soon after the plant opened, Plaintiffs zoning permit was revoked. Plaintiffs have stated that as they lacked a zoning permit, "the plant had to remain closed, the lease terminated, and the plant became the property of the State of Florida." (D.E. No. 1 at 15). Plaintiffs therefore argue they were "deprived of 'all economically beneficial or productive use of' its property, without compensation." *Id.* Plaintiffs asserted one claim in their Complaint, a violation of 42 U.S.C. § 1983 for a taking under the Fifth Amendment. *Id.* A similar case was previously filed in this Court. The Court dismissed the federal takings claim, relying on *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172, 194-97 (1985) and finding that the claim did "not become ripe until a plaintiff . . . [used] available state law procedures to obtain just compensation." (D.E. No. 25, Vol. II, Order at 365). Plaintiffs then filed suit in the Florida state court for Dade County alleging a federal takings claim but noting that they were pursuing these claims in state court "involuntarily" and reserving the right to pursue these claims in "a federal forum if necessary." (D.E. No. 25, Vol. I, Compl. at 35-36).[1] The Eleventh Circuit Court for Dade County entered summary judgment on Plaintiffs' claims including their federal takings claim, finding that "as a matter of law," . . . Plaintiffs . . . [were] not entitled to inverse condemnation

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[1] This Court has taken judicial notice of several other court proceedings involving these parties. (D.E. No. 44).

damages for the revocation of a conditional revocable zoning approval as a result of their own violation of conditions." (D.E. No. 25, Vol. VI, Order Granting Defendant's Motion for Final Summary Judgment at 9, 15). The Florida Third District Court of Appeal affirmed, *see Agripost, Inc. v. Metropolitan Miami-Dade County*, 845 So. 2d 918 (Fla. 3d DCA 2003), and the Florida Supreme Court denied review. Defendants have filed a Motion to Dismiss with Prejudice or for Final Summary Judgment. This Court will address only Defendants' Motion for Summary Judgment.

II. Legal Standard

Under Federal Rule of Civil Procedure 56(c), a Motion for Summary Judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Supreme Court further explained the movant's burden in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) as follows:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case,

> and on which that party will bear the burden of proof at trial.

Id. at 322. The Court further stated that "Rule 56(e) . requires a non-moving party to go beyond the pleadings and by [its] own affidavits or by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324. By its very terms, this standard provides that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there will be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). An issue of fact is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248; *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). It is "material" if it might affect the outcome of the case under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248.

III. Analysis

Defendant raises several arguments in their motion; however, this Court finds it is only necessary

to address Defendant's res judicata argument, which this Court finds has merit.[2] Under Florida law,[3]

> [f]or res judicata to apply, four elements must be established: "1) identity of the thing sued for; 2) identity of the cause of action; 3) identity of persons and parties of the action; and 4) identity of the quality of persons and parties of the action."

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[2] The Court does note that to the extent Defendants are challenging the propriety of the state court order, such a challenge violates the Rooker-Feldman doctrine, which limits "the subject matter jurisdiction of federal district courts and courts of appeal over certain matters related to previous state court litigation." *Goodman v. Sipos*, 259 F.3d 1327, 1332 (11th Cir. 2001). The Eleventh Circuit Court of Appeals has defined this doctrine stating:

> Rooker-Feldman bars lower federal court jurisdiction where four criteria are met: (1) the party in federal court is the same as the party in state court; (2) the prior state court ruling was a final or conclusive judgment on the merits; (3) the party seeking relief in federal court had a reasonable opportunity to raise its federal claims in the state court proceeding; and (4) the issue before the federal court was either adjudicated by the state court or was inextricably intertwined with the state court's judgment.

Amos v. Glynn County Board of Tax Assessors, 347 F.3d 1249, 1265 n.11 (11th Cir.2003) (internal citations omitted).

[3] [W]hen a federal court exercises federal question jurisdiction and is asked to give *res judicata* effect to a state court judgment, it must apply the '*res judicata* principles of the law of the state whose decision is set up as a bar to further litigation.'" *Amey Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1509 (11th Cir. 1985) (quoting *Hernandez v. City of Lafayette*, 699 F.2d 734, 736 (5th Cir. 1983)).

Selim v. Pan American Airways Corp., 889 So. 2d 149, 153 (Fla. 4th DCA 2004) (quoting *Signo v. Fla. Farm Bureau Cas. Ins. Co.*, 454 So. 2d 3, 4 (Fla. 4th DCA 1984)). This Court finds that the standard has been met as to all four elements based on Plaintiff's suit in the state court.

First, the suits meet the requirement that there be an "identity of the thing sued for." In the state court suit, Plaintiffs sought money damages for the federal takings claim violation. (D.E. No. 25 Vol. I, Compl.). In this case, Plaintiffs have also sought money damages. (D.E. No. 1 at 15-16). The suits also have "identity of the cause of action." This identity "is a question of 'whether the facts or evidence necessary to maintain the suit are the same in both actions.'" *Tyson v. Viacom, Inc.*, 890 So. 2d 1205, 1209 (Fla. 4th DCA 2005) (en banc) (quoting *Albrecht v. State*, 444 So. 2d 8, 12 (Fla. 1984), *superseded by statute on other grounds, Bowen v. Fla. Dep't of Envtl. Regulation*, 448 So. 2d 566 (Fla. 2d DCA 1984)). Here, Plaintiffs are asserting the identical federal takings claim; therefore, the facts and evidence necessary to maintain this suit are the same in both actions. The third element which requires an identity of the persons or parties in both suits is also met as both suits involve the same parties. *See* (D.E. No. 1); (D.E. No. 25, Vol. I, Compl.). Finally, the fourth element, requiring an identity of the quality of persons and parties is also met because as already stated both actions involved the same parties.

Plaintiffs argue that their specific reservation of federal jurisdiction in regard to their federal takings claim in their state suit prevents the state suit from having preclusive effect in this case. However, a recent United States Supreme Court case forecloses this argument. In *San Remo Hotel v. City and County of San Francisco, CA,* 125 S. Ct. 2491 (2005), hotel owners challenged the constitutionality of a hotel conversion ordinance, arguing that the ordinance was a taking in violation of the Fifth Amendment. The federal district court granted summary judgment and required the plaintiffs to first seek compensation in state court. *Id.* at 2497. The Ninth Circuit Court of Appeals affirmed this decision. *Id.* In the state court suit, plaintiffs reserved the right to return to federal court and adjudicate their federal takings claim. *Id.* However, despite the reservation, the state court decided the takings claim under both California law and federal law. *Id.* at 2498. Plaintiffs then returned to federal district court and the district court held that plaintiff's claim was barred by "issue preclusion." *Id.* at 2499. "The District Court reasoned that 28 U.S.C. § 1738 requires federal courts to give preclusive effect to any state-court judgment that would have preclusive effect under the laws of the State in which the judgment was rendered." *Id.* at 2499-2500. The court found that because the California court "interpreted the relevant substantive takings law coextensively with federal law, petitioners' federal claims constituted the same claims that had already been resolved in state court. *Id.* at 2500. The Ninth Circuit Court of Appeals affirmed. *Id.* The

United States Supreme Court also affirmed finding that "[a]lthough petitioners were certainly entitled to reserve some of their federal claims . . . their . . . expectation that their reservation would fully negate the preclusive effect of the state-court judgment with respect to any and all federal issues that might arise in the future federal litigation" was erroneous. *Id.* at 2501-02. The Court noted that there was no ultimate federal right to litigate federal claims in a federal court. *Id.* at 2504. The Court then held federal takings claims actually litigated in state court are not exempt from the full faith and credit statute, 28 U.S.C. § 1738, which encompasses the doctrines of res judicata and collateral estoppel. *Id.* at 2500, 2505-07.

Thus, any argument that Plaintiff's reservation of this issue for the federal court precludes the application of res judicata to this action is without merit. Here, it is clear that the federal takings claim was actually litigated in this case as the Court entered a specific order on this count. *See* (D.E. No. 25, Vol. VI, Order Granting Defendant's Motion for Final Summary Judgment). Therefore, as all of the elements of res judicata[4] have been met. It is hereby:

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[4] Defendants have also argued that this case is precluded by the doctrine of collateral estoppel. Under Florida law,

> [c]ollateral estoppel is a judicial doctrine which in general terms prevents identical parties from relitigating the same issues that have already been decided. The essential elements of the doctrine are that the parties and issues be identical, and that the particular matter

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ORDERED AND ADJUDGED that

1. Defendant Miami-Dade County's Motion for Summary Judgment **(D.E. Nos. 21-2)** is **GRANTED**. This case is **CLOSED** and all pending motions are **DENIED AS MOOT.**

2. Defendant Miami-Dade County's Motion to Dismiss with Prejudice **(D.E. No. 21-2)** is **DENIED AS MOOT**.

DONE AND ORDERED in Chambers at Miami, Florida, this 20 day of October, 2005.

/s/ Jose E. Martinez
JOSE E. MARTINEZ
UNITED STATES
DISTRICT JUDGE

Copies provided to:
Magistrate Judge Bandstra
All Counsel of Record

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be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction. The courts have emphasized that collateral estoppel precludes relitigation of issues actually litigated in a prior proceeding.

Dep't of Health & Rehab, Servs. v. B.J.M., 656 So.2d 906, 910 (Fla. 1995) (citing *Mobil Oil Corp. v. Shevin*, 354 So. 2d 372, 374 (Fla. 1977)). The court finds it unnecessary to discuss this issue in detail as the doctrine of res judicata bars this suit, however, this Court also finds that the elements of collateral estoppel have been met. Thus, this suit would also be barred by collateral estoppel.

APPENDIX C

United States Court of Appeals,
Eleventh Circuit.

AGRIPOST, INC., a Florida Corporation,
Agri-Dade Ltd., a Florida Limited Partnership,
Plaintiffs-Appellees,

v.

MIAMI-DADE COUNTY, through its Manager
and Board of County Commissioners,
Defendant-Appellant.

No. 97-5654.

Nov. 15, 1999.

Robert L. Krawcheck and James J. Allen, Asst. County Attys., Chesterfield Smith, Holland & Knight, Miami, FL, for Defendant-Appellant.

Joseph Wayne Beasley, Kelly, Black, Black, Byrne & Beasley, PA, Miami, FL, Sheldon H. Elsen, Orans, Elsen & Lupert, New York City, NY, for Plaintiffs-Appellees.

Charles McCoy, Asst. Atty. Gen., Tallahassee, FL, Amicus Curiae brief on behalf of Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT and EDMONDSON, Circuit Judges, and KRAVITCH, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

In 1987, the Board of Commissioners of Dade County, Florida, granted Agripost, Inc. an unusual use zoning permit for the construction and operation of a waste disposal facility. In 1991, the Dade County Zoning Appeals Board revoked the permit. After an appellate panel of the Dade County Circuit Court affirmed the revocation, and the Florida District Court of Appeal declined review, Agripost brought this suit against Dade County, claiming that the revocation constituted a taking without just compensation, in violation of the Fifth and Fourteenth Amendments.[1] The district court dismissed Agripost's takings claim as unripe because Agripost had failed to pursue Florida's inverse-condemnation remedy. The County now appeals,[2] contending that the district court should have dismissed Agripost's takings claim under the *Rooker-Feldman* doctrine[3] for want of subject matter jurisdiction, or, alternatively, granted it summary judgment on the ground that principles of

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[1] Agripost's complaint contained several other claims based on the revocation of Agripost's permit. With the exception of an equal protection claim, which we address in note 12 *infra*, none of these other claims are before us or are germane to this appeal.

[2] *See infra* part II.

[3] The *Rooker-Feldman* doctrine derives from *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and reserves to the United States Supreme Court the authority to review final decisions from a state's highest court. *See also infra*, note 7.

res judicata and collateral estoppel barred the claim. We agree with the district court that Agripost's takings claim was unripe. We therefore affirm its dismissal of the suit.

I.

In 1986, Dade County's Board of Commissioners (the "Board") sought proposals for the construction and operation of a waste disposal plant that would create an environmentally safe, useful end product from the county's solid waste. Agripost submitted a proposal, which the Board subsequently accepted. Agripost then leased a site for its facility.[4] Because the site was zoned for agricultural use, Agripost needed to obtain an unusual use zoning permit from the Board before it could construct and operate the plant. Agripost therefore applied for such a permit. On March 5, 1987, the Board approved Agripost's application, but made its approval subject to several conditions. One condition required Agripost to operate its facility in accordance with the plot use plan to be devised by Agripost and approved by the County's

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[4] Agripost's plant would convert garbage to agricultural fertilizer by grinding the garbage into small particles and then applying chemicals that enhanced the natural decay of the resulting waste. The site that Agripost selected for this facility abutted Dade County's landfill and was near the County's transfer station from which waste was distributed to disposal facilities. Unfortunately, the site was located in a residential neighborhood and was adjacent to an 800-student elementary school.

Zoning Director. Another required Agripost to comply with all "conditions and requirements" of Dade County's Department of Environmental Resource Management ("DERM"),[5] which included specific requirements for the storage of waste products, and that the facility not cause a nuisance.[6]

Agripost's facility began operating in the fall of 1989, and soon thereafter, area residents began complaining that finely ground waste particles were emanating from the plant and that a vile stench covered the area. According to officials from an adjacent elementary school, a "black, thick glue-like mold" was covering nearly every surface of the school, and students and teachers alike were developing various illnesses.

In October 1990, DERM informed Agripost that its facility was creating a nuisance; DERM alleged both that noxious odors were emanating from the plant, and that Agripost was storing waste products in a manner contrary to the conditions of its permit

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[5] DERM reviewed Agripost's permit application and issued a memorandum detailing a list of requirements that were in turn incorporated as conditions in the Board's resolution authorizing the unusual use zoning permit.

[6] On July 7, 1987, Agripost and Dade County signed an agreement for the construction and operation of the facility (the "Agreement"). The Agreement set out the amount of waste that the County would deliver per week to Agripost and the compensation that Agripost would receive for disposing of the waste. The Agreement also incorporated the conditions that the Board had placed on its approval of the unusual use zoning permit.

and in a location other than that prescribed by the plot use plan. The County's Building and Zoning Department ("B&Z") then initiated procedures to revoke Agripost's unusual use zoning permit; B&Z issued zoning violation notices that alleged that Agripost had breached the conditions of its permit, and requested a hearing before the Zoning Appeals Board ("ZAB") to determine whether the permit should be revoked. After a hearing on January 16, 1991, the ZAB concluded that Agripost had failed to comply with the conditions of its unusual use permit, and therefore revoked it. The Board affirmed the ZAB's decision.

Having exhausted its administrative remedies, Agripost appealed the Board's decision to a three-judge panel of the appellate division of the Dade County Circuit Court (the "Circuit Court"). After reviewing the administrative record, the court concluded that Agripost had failed to comply with the conditions of its permit; the court therefore affirmed the revocation of Agripost's permit. The Florida District Court of Appeal thereafter denied Agripost's petition for certiorari review. *See Agri-Dade, Ltd. v. Metropolitan Dade Co.*, 605 So.2d 1272 (Fla. 3d DCA 1992).

On September 29, 1994, Agripost brought the present lawsuit against Dade County in the United States District Court for the Southern District of Florida. Agripost claimed that by revoking the permit, the Board, and therefore Dade County, deprived it of all economically viable use of its leasehold

interest, of its facility, and of its rights under the Agreement. Because the County had not provided just compensation, Agripost contended, the permit revocation constituted a taking in violation of the Fifth and Fourteenth Amendments.

In response, Dade County, citing the *Rooker-Feldman* doctrine, which reserves to the United States Supreme Court the authority to review final decisions from a state's highest court, moved the district court to dismiss Agripost's takings claim for lack of subject matter jurisdiction. According to the County, the Circuit Court decided Agripost's takings claim in affirming the revocation of Agripost's permit. The County moved alternatively for summary judgment on the grounds of res judicata and collateral estoppel. It contended that (1) res judicata barred the takings claim because the claim was either litigated or should have been litigated in the Circuit Court proceeding, and (2) collateral estoppel barred the takings claim because a factual issue essential to the takings claim was resolved against Agripost in the Circuit Court.[7]

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[7] Although res judicata, collateral estoppel, and *Rooker-Feldman* are separate doctrines, they have a "close affinity" to one another. *Valenti v. Mitchell,* 962 F.2d 288, 297 (3d Cir.1992). In considering whether to give preclusive effect to state court judgments, federal courts must apply that state's law of collateral estoppel. *See Vazquez v. Metropolitan Dade County,* 968 F.2d 1101, 1106 (11th Cir.1992). Under res judicata, a final judgment "bars a subsequent suit between the same parties based upon the same cause of action and is conclusive as to all matters

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The district court, on its own initiative and over Dade County's objection, dismissed as unripe Agripost's takings claim, because Agripost had failed to pursue the inverse-condemnation remedy that Florida provided to property owners who, like Agripost, alleged that an administrative decision rendered their property worthless. In the district court's view, the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 194-97, 105 S.Ct. 3108, 3120-22, 87 L.Ed.2d 126 (1985), required Agripost to pursue that remedy before it could make a Fifth Amendment takings claim.[8]

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germane thereto that were or could have been raised." *Hoechst Celanese Corp. v. Fry,* 693 So.2d 1003, 1006 n. 9 (Fla. 3d DCA 1997). Collateral estoppel bars identical parties from relitigating issues that were actually adjudicated in a prior proceeding. *See Florida Dep't of Revenue v. Ferguson,* 673 So.2d 920, 922 (Fla. 2d DCA 1996). Under the *Rooker-Feldman* doctrine only the United States Supreme Court has the authority to review a final state court judgment that unambiguously disposes of a federal constitutional claim. *See Dale v. Moore,* 121 F.3d 624, 626 (11th Cir.1997). The doctrine not only bars review of claims that were actually litigated in state court, but also bars those that are "inextricably intertwined" with the state court judgment. *Feldman,* 460 U.S. at 482 n. 16, 103 S.Ct. at 1315 n. 16. A federal claim is intertwined with the state court judgment "if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Pennzoil Co. v. Texaco, Inc.* 481 U.S. 1, 25, 107 S.Ct. 1519, 1533, 95 L.Ed.2d 1 (1987) (Marshall, J., concurring).

[8] In *Williamson,* the Supreme Court noted that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson,* 473 U.S.

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In deciding that Agripost's takings claim was not ripe, the district court addressed the questions whether it should dismiss the claim for want of subject matter jurisdiction under the *Rooker-Feldman* doctrine or, instead, entertain the claim on the merits and reject it on grounds of res judicata and collateral estoppel. Citing an exception to the *Rooker-Feldman* doctrine, the court concluded without elaboration that that doctrine did not apply because Agripost "did not have a reasonable opportunity to raise [its claim for compensation] before the Circuit Court." Similarly, the district court stated that res judicata and collateral estoppel did not apply because Agripost's appeal of the permit revocation to the Circuit Court did not include a separate cause of action for inverse condemnation.[9]

Although Dade County prevailed in the district court, it is Dade County, not Agripost, that now appeals the district court's judgment. Dade County asks that we affirm the district court's dismissal of Agripost's takings claim, but that we do so on grounds that the district court rejected – namely, that the claim is barred by the *Rooker-Feldman* doctrine,

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at 194, 105 S.Ct. at 3120. Thus, the Court concluded, if the state has established a process for obtaining compensation, the property owner cannot prosecute a takings claim under the Fifth and Fourteenth Amendments unless he alleges that the state process is inadequate.

[9] In reaching this conclusion, the district court effectively denied the County's motion for summary judgment based on the affirmative defenses of res judicata and collateral estoppel.

res judicata, and collateral estoppel. We conclude that the district court correctly determined that Agripost's takings claim was unripe. We therefore affirm its dismissal of the claim.

II.

As a threshold matter, we must determine whether Dade County has standing to appeal the district court's judgment. Because the district court dismissed Agripost's suit, the County was the prevailing party below. Ordinarily, the prevailing party does not have standing to appeal because it is assumed that the judgment has caused that party no injury. *See Deposit Guar. Nat'l Bank v. Roper,* 445 U.S. 326, 333, 100 S.Ct. 1166, 1171, 63 L.Ed.2d 427 (1980); *Ashley v. Boehringer Ingelheim Pharms.* (*In re DES Litigation*), 7 F.3d 20, 23 (2d Cir.1993). An exception to this rule exists, however, when the prevailing party is prejudiced by the collateral estoppel effect of the district court's order. In such a case, the litigant has been aggrieved by the judgment and has standing to appeal. *See Ashley,* 7 F.3d at 23.

This exception applies in the present case. Here, although the district court ultimately dismissed Agripost's takings claim, it first considered – and rejected – Dade County's res judicata and collateral estoppel defenses. Unless it is set aside, the court's ruling regarding those defenses will have a preclusive effect in pending litigation that is likely to prejudice Dade County. Following the district court's ruling

that Agripost's takings claim had not been litigated in the Circuit Court and therefore was unripe, Agripost brought a takings claim in state court.[10] Because the district court rejected the County's collateral estoppel and res judicata defenses, the County will be precluded from raising those same defenses in the state court proceeding.[11] In other words, the County would

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[10] The state court proceeding has been stayed pending the outcome of this appeal.

[11] In this case, the Florida court would look to federal claim preclusion law in determining whether to give the former federal judgment preclusive effect. *See Andujar v. National Property and Cas. Underwriters*, 659 So.2d 1214, 1216 (Fla. 4th DCA 1995) ("We agree with defendant to the extent that federal claim preclusion law governs, rather than Florida's. Whenever res judicata is asserted, the court in the second forum is bound to give the former judgment the same preclusive effect that the rendering court would give it."). A district court's ruling has a preclusive (collateral estoppel) effect on subsequent litigation only if "(1) the issue [is] identical in both the prior and current action; (2) the issue was actually litigated; (3) the determination of the issue was critical and necessary to the judgment in the prior action; and (4) the burden of persuasion in the subsequent action [is not] significantly heavier." *SEC v. Bilzerian* (*In re Bilzerian*), 153 F.3d 1278, 1281 (11th Cir.1998). The district court's resolution of Dade County's res judicata and collateral estoppel defenses satisfies these criteria. First, because the takings claim that Agripost has filed in state court is identical to the one presently before us, the question whether res judicata and collateral estoppel bar the claim is also identical. Second, these two defenses were clearly litigated in the district court. Third, the district court's ruling regarding those defenses was necessary to its judgment; the essence of the defenses is that Agripost's takings claim had already been litigated in the Circuit Court, and the resolution of that issue was necessary to the district court's ruling that the takings claim was unripe.

(Continued on following page)

be precluded from arguing that Agripost had already raised and lost its takings claim. Thus, Dade County has standing to appeal the district court's judgment.[12]

III.

Before we address the County's alternative arguments that the district court should have either (1) dismissed Agripost's takings claim for want of subject matter jurisdiction, as required by the *Rooker-Feldman* doctrine, or (2) entertained the claim on the merits and granted summary judgment on the ground that the claim was barred by principles of res judicata or collateral estoppel, we think it necessary to recall what a property owner must allege in order to state a claim that a local entity has effected a

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Fourth, the burden of persuasion in the pending state court action is no heavier than the burden that existed in the district court. Thus, unless it is set aside, the district court's ruling will preclude Dade County from relitigating those defenses.

[12] In addition to the takings claim, Agripost's complaint raised a claim under the Fourteenth Amendment's Equal Protection Clause. The district court dismissed this claim for failure to state a claim upon which relief can be granted. *See* Fed.R.Civ.P. 12(b)(6). Although Dade County appeals the district court's dismissal of that claim on the ground that the court instead should have dismissed it under the doctrines of res judicata, collateral estoppel, and *Rooker-Feldman,* we conclude that the County has not been aggrieved by the district court's disposition of this claim. The district court's judgment prevents Agripost from relitigating its equal protection claim in another proceeding; consequently, there is no collateral estoppel effect that could be prejudicial to the County. We therefore make no further mention of Agripost's equal protection claim.

regulatory taking of his property without just compensation in violation of the Fifth Amendment.

First, the property owner must allege that the governmental action – here, the revocation of a permit to operate a waste disposal plant – has "denie[d] all economically beneficial or productive use of" his property. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893, 120 L.Ed.2d 798 (1992). In other words, the governmental action must have made the property worthless.

Second, the property owner must allege either that the state law provides him no process for obtaining just compensation (such as an action for inverse condemnation) or that the state law appears to provide such process, but due to state court interpretation, the process is inadequate.[13] If the property owner makes either allegation, then his Fifth Amendment takings claim is ripe. If, on the other hand, he makes neither allegation (and cannot do so because the state law affords an adequate process for

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[13] An example of how a state law – adequate on its face – could provide an inadequate remedy because of a state court's (the trial court's and/or the appellate court's) interpretation would be if the state law provided an inverse condemnation action to remedy a taking, but the state court interpreted the law as capping the property owner's damages at less than the value of what was taken. In such a case, the state court's interpretation of the law would render the remedy inadequate to provide "just compensation" within the meaning of the Fifth Amendment.

obtaining just compensation), his Fifth Amendment takings claim is not ripe. If such a claim is pending in federal district court, the district court must dismiss it for lack of subject matter jurisdiction since the owner has failed to establish an Article III "case or controversy." *See Reahard v. Lee County,* 30 F.3d 1412, 1417 (11th Cir.1994) ("It follows that '[a]s a practical matter, *Williamson* precludes litigation of the merits of a just compensation claim in federal court unless the state declines to provide adequate procedures through which an aggrieved party might seek compensation.'") (quoting *New Port Largo, Inc. v. Monroe County,* 985 F.2d 1488, 1496 (11th Cir.1993) (Tjoflat, C.J., specially concurring)). With the foregoing principles in mind, we turn to Dade County's argument that Agripost's Fifth Amendment takings claim was actually litigated in the Circuit Court (and decided against Agripost)[14] and, therefore, that the *Rooker-Feldman* doctrine required the district court to dismiss the claim for want of subject matter jurisdiction.

If Agripost's Fifth Amendment takings claim was actually litigated and decided against Agripost in the Circuit Court, the Circuit Court's decision must have

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[14] State courts of general jurisdiction, such as the Dade County Circuit Court, have the authority, if not a duty, to entertain the federal constitutional claims presented to them. Whether the three-judge Circuit Court that decided Agripost's appeal of the permit revocation would have had jurisdiction to consider Agripost's takings claim is problematic, as we point out in the text *infra.*

come after that court affirmed the County's revocation of Agripost's permit. That is because without the revocation of the permit, Agripost could not have claimed that the County's action denied Agripost all economically beneficial or productive use of its property. At that point, Agripost had to have filed a pleading (with the Circuit Court) alleging the following:

> The Circuit Court's decision affirming the County's revocation of the permit effectively rendered Agripost's property (its leasehold, its plant, and its rights under the Agreement) worthless; Florida law provides no adequate procedure, such as an action for inverse condemnation, for obtaining just compensation; because Florida law is deficient in this respect, Agripost has a ripe Fifth Amendment takings claim, and is entitled to just compensation.

The Circuit Court thereafter would have had to acknowledge Agripost's pleading, entertain Agripost's takings claim on the merits, and deny relief. The court would have denied relief because it found that the property had not been rendered worthless.

We conclude that the Circuit Court did not acknowledge, and therefore did not litigate, Agripost's takings claim for two reasons. First, the record is devoid of any indication that Agripost presented such a claim to the Circuit Court after the court

affirmed the Board's revocation of Agripost's permit.[15] Specifically, we find no allegation by Agripost to the effect that its property had been rendered worthless and that Florida provided no adequate process for obtaining just compensation. Nor is there any indication that the Circuit Court noticed a takings claim on its own initiative and, having done so, rejected it as legally insufficient.

Second, the Circuit Court lacked the authority to determine the takings issue. The Circuit Court's task was limited to one question: whether the Board's revocation of Agripost's permit was justified. The court was not called upon to determine whether there had been a Fifth Amendment taking. A Fifth Amendment takings claim could not have materialized until the Circuit Court passed on the propriety of the Board's revocation of Agripost's permit. *See Lake Lucerne Civic Ass'n Inc., v. Dolphin Stadium Corp.*, 878 F.2d 1360, 1370 (11th Cir.1989) ("The point is that the propriety of the agency action must be finally determined before a claim for inverse condemnation exists.") (quoting *Albrecht v. State*, 444 So.2d 8, 12 (Fla.1984)). Only after the Circuit Court affirmed the Board's decision and the Florida District Court of Appeal denied Agripost certiorari review could Agripost have claimed that the revocation of the permit

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[15] Nor is there any indication that Agripost presented the Circuit Court with a Fifth Amendment takings claim prior to the court's decision affirming the revocation of Agripost's permit.

rendered its property worthless.[16] *See id.* In sum, the takings issue was not – nor could it have been – entertained by the Circuit Court in its appellate review of the Board's action on Agripost's permit. Consequently, the *Rooker-Feldman* doctrine did not require the district court to dismiss Agripost's takings claim.

We next turn to Dade County's claim that the district court should have granted it summary judgment on the ground that res judicata barred Agripost's claim. Res judicata bars a subsequent suit between the same parties based on the same cause of action. It applies to (1) all matters that were actually raised, and (2) all matters that could have been raised in the prior suit. *See Hoechst Celanese Corp.*, 693 So.2d at 1006 n. 9; *ICC Chem. Corp. v. Freeman*, 640 So.2d 92, 93 (Fla. 3d DCA 1994). The County claims that res judicata barred the takings claim because Agripost actually raised (and the Circuit Court actually adjudicated) that claim; alternatively, Dade County contends that res judicata applied because Agripost had an opportunity to present that claim to the Circuit Court.

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[16] The allegation that the property had become worthless could not be made until the revocation of the permit became effective; that is, when the Circuit Court affirmed the Board's decision and the Florida District Court of Appeal denied Agripost's petition for certiorari on September 21, 1992. *See Agri-Dade*, 605 So.2d at 1272.

Unfortunately for Dade County, our conclusion that the *Rooker-Feldman* doctrine is inapplicable forecloses the County's res judicata defense. First, as we have observed, the Circuit Court did not adjudicate a takings claim, because Agripost did not present one to the court. Second, Agripost did not have an opportunity to present the claim; it could not have done so until judicial review (of the Board's action) in the Circuit Court and in the Florida District Court of Appeal had run its course.

Finally, we consider Dade County's contention that the takings claim was barred by collateral estoppel. The County asserts that the district court should have granted it summary judgment on the basis of that defense because the Circuit Court, in reviewing the permit revocation, found that the Board's action had not rendered Agripost's property worthless. The necessary result of this finding, the County contends, is that Agripost's Fifth Amendment takings claim fails as a matter of law. The County's argument proceeds as follows.

In *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 321, 107 S.Ct. 2378, 2389, 96 L.Ed.2d 250 (1987), the Supreme Court recognized that state courts have the power to strike down zoning actions that are confiscatory, thereby subjecting the local government to liability for a temporary taking only. In Florida, a zoning ordinance that effectively confiscates property is void. *See Dade County v. National Bulk Carriers Inc.,* 450 So.2d 213, 216 (Fla.1984). According to the County,

this rule also applies in a case involving the denial of a permit; thus, if the denial is confiscatory, it is void. Therefore, in reviewing the County's action in the instant case, the Circuit Court was required to set aside the Board's action if it was confiscatory.[17] Under the County's view of the law, because the Circuit Court affirmed the Board's action, it necessarily found that the action was not confiscatory – that is, Agripost was not deprived of all productive use of its property. Given this finding, Dade County contends, collateral estoppel precluded Agripost from establishing in the district court an indispensable element of its takings claim (that the Board's action rendered its property worthless), and the court should have granted the County summary judgment.

Dade County's argument is correct in part; certain zoning actions are invalid under Florida law if they are confiscatory. What the County fails to recognize, however, is that this rule only applies to zoning ordinances, not to permit denials or revocations that constitute a proper exercise of the local government's police power. *See Key Haven Associated Enters., Inc. v. Board of Trustees of the Internal Improvement Trust Fund,* 427 So.2d 153, 159 (Fla.1982).

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[17] In reviewing the propriety of the Board's revocation of Agripost's permit, the Circuit Court was required to determine "whether the essential requirements of the law have been observed." *City of Deerfield Beach v. Vaillant,* 419 So.2d 624, 626 (Fla.1982). The County contends that an essential requirement of the law was that the Board's action not be confiscatory.

In the proceeding before the Circuit Court, whether the Board's revocation of Agripost's permit effectively confiscated its property was irrelevant; the question before the court was whether the revocation was within the scope of the Board's police power. The court answered the question in favor of the County. Because the Circuit Court did not consider whether the Board's action would, if permitted to stand, effectively confiscate Agripost's property, the district court correctly held that collateral estoppel did not bar Agripost's Fifth Amendment takings claim.

IV.

At last, we turn to the question whether the district court properly dismissed Agripost's takings claim as unripe. We conclude that it did. Agripost failed to allege in the district court (as it failed to allege in the Circuit Court) either that Florida provided no process for obtaining just compensation or that the process it provided was inadequate. Agripost's Fifth Amendment claim was not ripe for review; therefore, the district court properly dismissed it for want of subject matter jurisdiction.

AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

AGRIPOST, INC., a Florida corporation and AGRI-DADE, LTD., a Florida limited partnership,

Plaintiffs,

v.

METROPOLITAN DADE COUNTY,

Defendant. /

CASE NO. 94-2031-CIV-DAVIS
MAGISTRATE JUDGE JOHNSON

BEFORE THE COURT is Metropolitan Dade County's Motion to Dismiss or, in the alternative, Motion for Summary Judgment (D.E. 10. After due consideration of the parties' memoranda of law and oral argument, the Court will dismiss the federal claims and decline to exercise supplemental jurisdiction over the state claims.

I. Factual Background

In July 1987, the Dade County Board of Commissioners ("Board") and Agripost, Inc. entered into a contract for construction of a demonstration facility to

convert municipal solid waste into compost.[1] Before executing the contract, Agripost worked with Dade County staff to locate a site for the facility. Complaint at ¶ 27. Agripost selected a site on the west side of Northwest 47th Avenue, adjacent to a state-owned school for individuals with disabilities, a "halfway house" detention center for women operated by the State of Florida, and an elementary school surrounded by single-family homes. *See* Zoning Hearing File at 22, 95. The State of Florida, owner of the site, was leasing it to the Florida Department of Health and Rehabilitative Services ("HRS"). Complaint at ¶ 28.

On October 28, 1986, Agripost entered into a long-term lease of the site with HRS.[2] The lease also gave Agripost an option to lease up to thirty additional acres within a defined tract adjoining the site (the "adjacent site"). The lease provided that it would become void should Agripost fail to obtain a contract to construct and operate a resource recovery facility within six months of its effective date. Complaint at ¶ 31. In addition, HRS had the option to terminate the lease if the site was not used for a resource recovery facility. Complaint at ¶ 31. Upon termination, all

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[1] The Contract was subsequently assigned to Agri-Dade. Complaint at 23.

[2] On July 8, 1988, Agri-Dade became the lessee of the site pursuant to an assignment approved by the State of Florida and HRS. Complaint at 29.

buildings on the site would pass to HRS without any compensation to Agripost. Complaint at ¶ 31.

Following execution of the lease, Dade County's Building and Zoning Department ("B&Z") advised Agripost that it would need an unusual use permit to operate the resource recovery facility on the site, which was zoned for agricultural use. Complaint at ¶ 32. B&Z also informed Agripost that it would not need a permit to store composted product in the adjacent site. Complaint at ¶ 34.

Agripost then applied for an unusual use permit to build and operate the facility on the site. Complaint at ¶ 34. The Board of County Commissioners approved the unusual use permit on March 5, 1987, in Resolution Z-63-87.[3] The approval was expressly subject to certain conditions, including:

> . . .
>
> 2. That in approval of the plan, the same be substantially in accordance with that submitted for the hearing entitled "Dade County MSW Composting Facility Agripost, Inc." . . .
>
> 3. That the use be established and maintained in accordance with the approved plan.

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[3] A group of citizens appealed Resolution Z-63-87, arguing the proposed use was incompatible with the neighborhood. *Concerned Citizens of Carol City, Inc. v. Metropolitan Dade County and Agripost, Inc.*, Circuit Court No. 87-139 AP. Complaint at 37. The state court affirmed the Board's decision.

. . .

> 8. That the applicant comply with all conditions and requirements of the Department of Environmental Resources Management.

Resolution Z-63-87. Paragraph 8 incorporated various conditions, including 1) that the compost product be covered and stored on an impermeable base, 2) that the operation of the composting facility not cause a nuisance, and 3) that no solid waste or compost products be stored outdoors where they could be exposed to rainfall. *See* Motion Appendix A at 47 (Department of Environmental Resources Management Memorandum dated February 24, 1987).

On July 7, 1987, the County and Agripost entered into a contract for construction of a demonstration facility to convert municipal solid waste into compost.[4] Complaint at ¶ 23. The contract incorporated the provisions of the unusual use permit approval. Contract at ¶ 3.01. The contract also contained a provision regarding "obnoxious odors" which stated " . . . continual generation of obnoxious odors, if not corrected within a reasonable time after written notice by the County, shall constitute a default by Agripost." Complaint at ¶ 50.

In October 1990, the Department of Environmental Resources Management ("DERM") notified

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[4] The Contract was subsequently assigned to Agri-Dade. Complaint at 23.

Plaintiffs that the facility was generating obnoxious odors and creating a nuisance. Complaint at ¶ 54. DERM then ordered Plaintiffs to submit, among other things, an odor control plan for approval. DERM approved a modified version of Plaintiffs' plan on December 10, 1990. Complaint at ¶ 57. Plaintiffs and the County then discussed a possible contract amendment that would enable Plaintiffs to implement the Odor Control Plan.[5] At a December 20, 1990 meeting, the Board voted to reject the proposed amendment. Complaint at ¶ 65.

In the meantime, Dade County's Building and Zoning Department ("B&Z") issued violation notices and applied for a hearing before the Zoning Appeals Board ("ZAB"), claiming Plaintiffs had violated Conditions No. 2, 3 and 8 of the unusual use zoning resolution. Complaint at ¶ 70. The ZAB held a revocation hearing on January 16, 1991 and voted to revoke the unusual use, finding that Plaintiffs had, in fact, violated these conditions. Complaint at ¶ 78. Plaintiffs closed the plant the following day and appealed the ZAB's decision to the Board of Commissioners. Complaint at ¶ 81. After a hearing on May 23, 1991, the Board affirmed the ZAB's decision.

On July 10, 1991, Agri-Dade appealed the Board's order to the Appellate Division of the Circuit

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[5] The proposed amendment would increase some of the "tipping fees" the County was required to pay under the original contract.

Court for the Eleventh Judicial Circuit of Florida. On June 5, 1992, the Circuit Court affirmed the Board's action *Agri-Dade, Ltd. v. Metropolitan Dade County*, Case No. 91-214-AP ("The County's decision must be affirmed because . . . Agri-Dade is found by the substantial competent evidence test not to have complied with the conditions of the resolution, therefore justifying the County's revocation").

On July 6, 1992, Agri-Dade petitioned the Florida Third District Court of Appeal for a writ of certiorari. The Third District denied the petition without comment on September 21, 1992. Plaintiffs subsequently filed for bankruptcy protection under Chapter 11 of the federal Bankruptcy Code. Complaint at ¶ 31.

On September 29, 1994, Plaintiffs filed the present action, asserting the following federal and state law claims: inverse condemnation under the Fifth Amendment to the U.S. Constitution and 42 U.S.C. § 1983 (Count I), inverse condemnation under Florida law (Count II), violations of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Section 1983 (Count III), 4) violations of their procedural due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution and Section 1983 (Count IV), violations of Fl. Stat. § 405.7063 (Count VI), breach of contract (Count VII), and equitable estoppel (Count VIII).[6]

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[6] The Complaint originally asserted a claim for violations of substantive due process rights under the Fourteenth Amendment to the U.S. Constitution and Section 1983 (Count V).

(Continued on following page)

II. Preclusion

a. Preclusive Effects of Prior Litigation on Federal Claims

The County argues that the Florida Circuit Court's decision has a preclusive effect on Plaintiff's federal claims in this present action. This argument is premised on the *Rooker-Feldman* doctrine, as well as principles of res judicata and collateral estoppel. After considering the prior state court litigation in the context of each of these doctrines, the Court rejects the County's argument with respect to Plaintiffs' inverse condemnation and equal protection claims (Counts I & III). However, the Court concludes the *Rooker-Feldman* doctrine bars Plaintiffs' procedural due process claim (Count IV).

The *Rooker-Feldman* doctrine provides that a federal district court may not review the final decisions of a state court of competent jurisdiction. *District of Columbia Ct. of App. v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923). The rule applies "not only to claims actually raised in the state court, but also to claims that were not raised in the state court but are 'inextricably intertwined' with the state court's judgment." *Feldman* 460 at 582 n.16. The Eleventh Circuit has recognized an exception to the rule when the plaintiff has no "reasonable opportunity to raise his

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Plaintiffs are no longer pursuing this claim. Response at 29 n.10.

federal claim in the state proceedings." *Powell v. Powell*, 80 F.3d 464, 467 (11th Cir. 1996). Under those circumstances, the federal claim is not considered "inextricably intertwined" with the state court judgment. *Id.*

In considering Plaintiff's due process claim, the Court notes that the Appellate Division of the Circuit Court reviewed the County's action pursuant to Florida Rule of Appellate Procedure 9.030(c)(3). This rule requires the Circuit Court to determine (1) whether procedural due process was accorded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So.2d 624 (Fla. 1982). By affirming the County's action, the Circuit Court necessarily determined that no procedural due process violation had occurred. Under the *Rooker-Feldman* doctrine, this Court may not re-determine whether Plaintiff's procedural due process rights were violated. *Baggs v. City of South Pasadena*, 947 F.Supp. 1580, 1583 (M.D. Fla. 1996). Accordingly, the Court will dismiss Plaintiffs' procedural due process claim.

Plaintiff's remaining federal claims – equal protection and inverse condemnation – fall within the exception to the *Rooker-Feldman* doctrine, because Plaintiffs did not have a reasonable opportunity to raise these arguments before the Circuit Court. This Court will not have to review the state court judgment to consider these claims.

Similarly, the doctrine of res judicata does not bar Plaintiffs' equal protection and in verse condemnation claims. Res judicata precludes relitigation of claims that were actually litigated or could have been litigated in an earlier suit. Under Florida law, the following elements must be present for the doctrine to apply: 1) identity of the thing sued for, 2) identity of the cause of action, 3) identity of parties, and 4) identity of the quality in the person for or against whom the claim is made. *Albretch v. State*, 44 So.2d 8, 11 (1984). The action before the Circuit Court consisted of a direct appeal from the Board of County Commissioners, where Plaintiffs challenged the propriety of an administrative action. Since that cause of action is different from Plaintiffs' equal protection and inverse condemnation claims, res judicata does not apply.

Finally, the doctrine of collateral estoppel does not apply. Collateral estoppel applies when identical parties wish to relitigate issues that were actually litigated as necessary and material issues in a prior action. *Carson v. Gibson*, 638 So.2d 79, 81 (Fla. 2d DCA 1994). Since none of the issues which must be determined in the equal protection or inverse condemnation claims were actually litigated in the Circuit Court, these claims are not precluded.

b. Preclusive Effects of Prior Litigation on the State Inverse Condemnation Claim

The County contends Plaintiffs' inverse condemnation claim under state law was already litigated before the Circuit Court.[7] This Court disagrees. Under Florida law, Plaintiffs are not barred from bringing an inverse condemnation action after unsuccessfully challenging the propriety of an administrative agency action, judicially or otherwise. *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 587-88 (11th Cir. 1990); *Albretch*, 444 So.2d at 12-13, *superseded by statue on other grounds as sated in*, *Bowen v. Florida Dep't of Envtl. Regulation*, 448 So.2d 566 (Fla. 2d DCA 1984).

III. Ripeness Considerations

Counts I and II assert causes of action for inverse condemnation under federal and state law, respectively. With respect to the federal claim, Plaintiffs allege that the County deprived them of their property interests without just compensation, pursuant to

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[7] The Court is aware that Plaintiffs raised the takings claims in their Petition for Writ of Certiorari to the Third District Court of Appeal. The County improperly relies on the Petition and on the District Court's denial without opinion of the petition to argue that these issues were previously litigated. A denial without opinion of a petition for certiorari does not constitute an adjudication on the merits. *Don Most Agency, Inc. v. Harrison*, 362 So.2d 56 (Fla. 2d DCA 1978); *Bing v. A.G. Edwards & Sons, Inc.*, 498 So.2d 1279, 1280 (Fla. 3d DCA 1986).

Section 1983 and the Fifth Amendment to the United States Constitution. The Untied States Supreme Court has held, however, that a takings claim under the Fifth Amendment does not become ripe until a plaintiff uses available state law procedures to obtain just compensation. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-197 (1985); *see also New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1089 (11th Cir. 1996). The rationale behind this holding is that the Fifth Amendment does not proscribe the taking of property; rather, it proscribes the taking of property without just compensation. *Hamilton Bank*, 473 U.S. at 194 (emphasis added).

Since Plaintiffs have not pursued their state in verse condemnation claim in the Florida courts, the Court will dismiss the federal claim (Count I) without prejudice.

IV. Dismissal under Rule 12(b)(6)

The County has moved to dismiss Plaintiff's equal protection claim (Count III) for failure to state a claim under Fed. R. Civ. P. 12(b)(6). When considering the County's motion, the Court must construe the Complaint in the light most favorable to the Plaintiffs and take its allegations of material fact as true. *Cannon v. Macon County*, 1 F.3d 1558, 1565 (11th Cir. 1993). The Court's inquiry is directed to whether the allegations in the Complaint constitute a statement of a claim under Fed. R. Civ. P. 8(a). *Investors*

Syndicate of Am., Inc. v. City of Indian Rocks Beach, 434 F.2d 871, 879 (5th Cir. 1970).[8] To state a claim, Rule 8(a) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." The Court should not dismiss a complaint for failure to state a claim "'unless it appears beyond doubt that the plaintiff can prove no set of facts'" which would entitle it to relief. *Cannon*, 1 F.3d at 1565 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Plaintiffs' claim that the County deprived them of their equal protection rights in violation of the Fourteenth Amendment fails under Rule 12(b)(6). The Equal Protection Clause requires that all similarly situated persons be treated alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985); *Baggs v. City of South Pasadena*, 947 F.Supp. 1580, 1584-85 (M.D. Fla. 1996); *Moore v. City of Edgewood*, 790 F.Supp. 1561 (M.D. Fla. 1992), *aff'd*, 985 F.2d 578 (11th Cir. 1993). If dissimilarly situated people are treated differently, then there is no equal protection violation. *E & T Realty v. Strickland*, 830 F.2d 1107, 1111 (11th Cir. 1987). Plaintiffs contend the County treated County-owned facilities more favorably than it treated Plaintiffs' facility. Complaint at ¶¶ 98-104; ¶¶ 114-120. However, the factual allegations in the Complaint and the attachments reveal that Plaintiffs' facility was unique in terms of

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[8] Decisions of the Fifth Circuit issued before October 1, 1981 are binding authority in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

its location, mode of operation, and the terms under which it was permitted to operate. *See e.g.*, Complaint at ¶ 7 (goal was to build a demonstration facility as a model), 21-23 (proposal submitted for an "alternative" resource recovery facility), 32 (unusual use zoning required), and 35 (unusual use granted subject to conditions). Based on these allegations, it appears Plaintiffs' facility and the County's facilities are not similarly situated. Accordingly, this Court concludes that Plaintiffs have failed to state an equal protection claim under Rule 12(b)(6).

V. State Law Claims

Since the Court has dismissed the federal claims, it must now decide whether to exercise jurisdiction over the remaining state law claims – Counts II and VI-VIII. A federal court may decline to exercise jurisdiction where principles of judicial economy, convenience, fairness, and comity favor proceeding in state court. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 (1988). In particular, where the federal claims are dismissed before trial, the federal district court should dismiss the state claims, as well, *Id.* at 350 n.7.

Plaintiffs argue the Court may exercise jurisdiction based on 28 U.S.C. § 1334(b) because this case relates to their bankruptcy proceeding. However, 28 U.S.C. § 1334(c)(1) permits the district court to abstain from hearing a particular proceeding "in the interest of justice or in the interest of comity with

state courts or respect for state law." Given that the controlling law in this action is Florida state law, the factors in Section 1334(c)(1) weigh in favor of abstention. Accordingly, the Court declines to exercise jurisdiction over the state claims.

VI. Conclusion

Accordingly, for the reasons stated in this order, it is

ORDERED AND ADJUDGED as follows:

(1) Count I is DISMISSED WITHOUT PREJUDICE as unripe;

(2) Count III is DISMISSED for failure to state a claim;

(3) Count IV is DISMISSED under the *Rooker-Feldman* doctrine;

(4) Counts II, VI, VII and VIII are DISMISSED, as the Court declines to exercise jurisdiction over them;

(5) This case is CLOSED. All pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 5th day of ~~August~~ [Sept.] 1997.

/s/ Edward B. Davis
EDWARD B. DAVIS
CHIEF UNITED STATES
DISTRICT JUDGE

cc:
Robert A. Ginsburg, Esq.
Robert Krawcheck, Esq.
Leslie Lupert, Esq.
Joseph Beasley, Esq.
Chesterfield Smith, Esq.

APPENDIX E

AGRIPOST, INC., a Florida corporation, and Agri-Dade, Ltd., a Florida limited partnership, Appellants,

v.

METROPOLITAN MIAMI-DADE COUNTY, through its Manager and Board of County Commissioners, Appellee.

No. 3D01-1898.

District Court of Appeal of Florida,
Third District.

March 26, 2003.

Rehearing Denied May 28, 2003.

Orans, Elsen & Lupert; Josephs, Jack & Gaebe, Coral Gables, and Joseph W. Beasley, for appellants.

Holland & Knight and Daniel S. Pearson; Robert A. Ginsburg and Robert L. Krawcheck and James J. Allen, Miami, for appellee.

Before SCHWARTZ, C.J., and COPE and GODERICH, JJ.

COPE, J.

Agripost, Inc. and Agri-Dade, Ltd. appeal an adverse summary judgment in their suit against Miami-Dade County for inverse condemnation, breach of contract, and violation of section 403.7063, Florida Statutes (1989). We affirm.

I.

In 1986, Miami-Dade County "sought proposals for the construction and operation of a waste disposal plant that would create an environmentally safe, useful end product from the County's solid waste. Agripost submitted a proposal, which the Board [of County Commissioners] subsequently accepted." *Agripost, Inc. v. Miami-Dade County,* 195 F.3d 1225, 1227 (11th Cir.1999).

In 1987, Agripost subleased a twenty-acre site from the Florida Department of Health and Rehabilitative Services for construction of the waste disposal plant. The site was near an elementary school and other public institutions.

Because the property was zoned for agricultural use, Agripost obtained a conditional, revocable unusual use zoning approval. There were a number of conditions, and the unusual use was revocable upon violation of the conditions. Among the conditions was the prohibition of any nuisance on the property. Agripost had made assurances that its process would prevent any odor problem associated with the facility.

Soon thereafter, the County entered into a contract with Agripost to supply garbage to the facility for processing. The County was to pay a fee to Agripost, called a "tipping" fee, per ton of garbage supplied. Under the contract, the County had no financial responsibility for the design, construction, or operation of the facility.

The contract provided that "[o]bjectionable odors should not be detected at the company's property limits as a result of the processing operation. . . . Continual generation of obnoxious odors, if not corrected within a reasonable time after written notice by the County, shall constitute a default by Agripost."

As summarized in an opinion in related litigation:

> Agripost's facility began operating in the fall of 1989, and soon thereafter, area residents began complaining that finely ground waste particles were emanating from the plant and that a vile stench covered the area. According to officials from an adjacent elementary school, a "black, thick glue-like mold" was covering nearly every surface of the school, and students and teachers alike were developing various illnesses.
>
> In October 1990, [the County Department of Environmental Resource Management ("DERM")] informed Agripost that its facility was creating a nuisance; DERM alleged both that noxious odors were emanating from the plant, and that Agripost was storing waste products in a manner contrary to the conditions of its permit and in a location other than that prescribed by the plot use plan.

Agripost, 195 F.3d at 1228.

Agripost submitted a plan to the County to correct the cited problems. This involved modifications to the

existing facility to improve odor control. The proposal included expansion of the site to include an adjacent thirty acres, to which some of the operations would be relocated.

The important point for present purposes is that Agripost proposed to pay for these changes by increasing the tipping fee that the County paid to Agripost.

In December 1990, Agripost's package of curative measures was presented to the County's Commission for approval. At that meeting, the Agripost president informed the County Commission that the plant would not continue to operate "if we don't pass the things that are before you today." After a public hearing, the County Commission voted to reject the Agripost modification proposal, and directed County officials to initiate proceedings before the Zoning Appeals Board to revoke Agripost's conditional zoning.

In 1991, the Zoning Appeals Board concluded after a hearing that Agripost had violated the conditions of its unusual use permit, and revoked it. This ruling was affirmed by the County Commission as well as a three-judge panel of the Appellate Division of the Circuit Court. This court denied Agripost's petition for certiorari review without opinion. *Agri-Dade, Ltd. v.*

Metropolitan Dade County, 605 So.2d 1272 (Fla. 3d DCA 1992). Agripost ceased operations.[1]

In 1994, Agripost brought an inverse condemnation suit against the County in the United States District Court for the Southern District of Florida. Agripost alleged that by revoking the unusual use zoning permit, the County deprived Agripost "of all economically viable use of its leasehold interests, of its facility, and of its rights under the Agreement." *Agripost,* 195 F.3d at 1228. "The district court dismissed Agripost's takings claim as unripe because Agripost had failed to pursue Florida's inverse-condemnation remedy." *Id.* at 1227. The United States Court of Appeals for the Eleventh Circuit affirmed. *Id.* at 1233-34.

In 1997, after the federal district court ruled, Agripost filed the instant action in state court. Agripost has alleged a claim under the Florida Constitution for inverse condemnation (count one); breach of contract (count two); and violation of section 403.7063, Florida Statutes (count three). In count four, Agripost states that it intends to reserve an inverse condemnation claim under the federal Constitution to be pursued in the federal court, should this lawsuit be unsuccessful. *See Agripost,* 195 F.3d at 1227, 1229-30, 1233-34; *Fields v. Sarasota Manatee*

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[1] Agripost filed for bankruptcy protection. The only asset of the bankruptcy estate is its claim against Miami-Dade County.

Airport Authority, 953 F.2d 1299, 1305-06 (11th Cir.1992).

The trial court entered summary judgment in favor of the County, and Agripost has appealed.

II.

In the context of a federal inverse condemnation claim, it has been said, "Generally, when a government entity acts to create property rights yet retains the power to alter those rights, the property right is not considered 'private property,' and the exercise of the retained power is not considered a 'taking' for Fifth Amendment purposes." *Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n,* 38 F.3d 603, 606 (D.C.Cir.1994) (citations omitted); *see also Smalleylogics Corp. v. Dade County,* 176 So.2d 574, 578 (Fla. 3d DCA 1965). We follow that principle here in the context of the inverse condemnation claim under the Florida Constitution.

In the present case Agripost obtained an unusual use zoning approval which was conditional and revocable. The County brought revocation proceedings against Agripost for violation of the prescribed conditions. The Zoning Appeals Board revoked the unusual use zoning approval, and the revocation was upheld in the subsequent administrative and judicial review. Since the zoning approval was conditional and revocable, and Agripost violated the conditions, it follows that the revocation of the permit did not amount to a compensable taking for inverse condemnation

purposes. *Democratic Central Committee; see Smalleylogics.*

Agripost argues, however, that under its contract with the County, it was entitled to a reasonable opportunity to cure the violation of the zoning conditions. Agripost correctly states that the contract had a cure provision. Agripost contends that the County Commission was obligated to accept Agripost's proposal to solve the odor problem. Agripost argues that in rejecting the proposal, the County breached the contract. We disagree.

Agripost's proposal was not a straightforward plan to accomplish a cure at Agripost's expense. Instead, Agripost proposed to pay for the facility modifications by charging higher fees to the County than were called for under the existing contract.

In his oral presentation to the County Commission, the Agripost president indicated that Agripost would not continue to operate unless the County agreed to the package of proposed modifications. The County Commission was certainly within its rights in rejecting a proposal that in substance required the County to pay Agripost more money to cure the odor problem.[2]

---

[2] Although we need not reach it, the County also argues that the Commission was well within its rights in rejecting the proposal to expand the facility by an additional thirty acres, given the already severe odor problems on the existing twenty.

It would present different issues if Agripost had simply requested forbearance by the County for a reasonable time so that Agripost could correct the facility problems at its own expense. That was not, however, Agripost's proposal. The trial court correctly rejected the breach of contract claim.

Agripost maintains that the County violated section 403.7063, Florida Statutes, which states in part that "no county or municipality shall adopt or enforce regulations that discriminate against privately owned solid waste management facilities because they are privately owned." Agripost argues that at the time relevant here, the County was paying a higher tipping fee at other facilities. Assuming that is so, there is no statutory violation. The statute does not provide a right to increase a contractually negotiated fee.

Affirmed.

APPENDIX F

Supreme Court of Florida
WEDNESDAY, OCTOBER 15, 2003

CASE NO.: SC03-1181
Lower Tribunal No.: 3D01-1898

AGRIPOST, INC., ETC., ET AL.	vs.	METROPOLITAN MIAMI-DADE COUNTY, ETC.
Petitioner(s)		Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d).

ANSTEAD, C.J., and WELLS, PARIENTE, LEWIS and QUINCE, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall (SEAL)
Thomas D. Hall
Clerk, Supreme Court

mc
Served:

JOSEPH WAYNE BEASLEY
ROBERT L. PLOTZ
LESLIE A. LUPERT
SHELDON H. ELSEN
JOHN J. MONTONE
ROBERT L. KRAWCHECK
JAMES J. ALLEN
DANIEL S. PEARSON
HON. MARY CAY BLANKS, CLERK
HON. HARVEY RUVIN, CLERK
HON. GERALD D. HUBBART, JUDGE

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-16499-DD

AGRIPOST, LLC,
a Florida Limited Liability Company,
(successor by merger to Agripost, Inc.),
AGRI-DADE, LTD., a Florida limited partnership,

Plaintiffs-Appellants,

versus

MIAMI-DADE COUNTY, FLORIDA,
a political subdivision of the State of Florida,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed May 30, 2008)

BEFORE: TJOFLAT, HULL and BOWMAN,* Circuit Judges.

---

* Honorable Pasco M. Bowman II, United States Circuit Jude [sic] for the Eight [sic] Circuit, sitting by designation.

PER CURIAM:

The petition for rehearing filed by Appellants Agripost, Inc., is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

21

(5)

No. 08-567

Supreme Court, U.S.
FILED
FEB 26 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

AGRIPOST, LLC, a Florida limited liability company (successor by merger to Agripost, Inc.), and AGRI-DADE, LTD., a Florida limited partnership,
Petitioners,

v.

MIAMI-DADE COUNTY, a political subdivision of the State of Florida,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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February 26, 2009

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QUESTION PRESENTED

1. Whether an owner of conditional, unusual-use zoning who declined to appeal a federal court order dismissing his federal claims as unripe under *Williamson County;* then litigated and lost his state inverse condemnation action, therein admitting that he was raising his identical federal claims as well; and then lost his federal takings claim action on preclusion grounds, can now claim that he is entitled to relitigate his federal takings claim anew?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

CITIATIONS TO THE OPINIONS AND ORDERS BELOW 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION ... 12

I. THE PETITION SHOULD BE DENIED, BECAUSE THE COURT OF APPEALS CORRECTLY DETERMINED THAT AGRIPOST CANNOT RELITIGATE ITS FEDERAL TAKINGS CLAIM. 13

A. There Is No Compensable Taking Based Upon Revocation of a Conditional Revocable Zoning Approval for an Isolated Use, Where the Revocation Resulted from the Violation of Conditions and the Creation of a Public Nuisance. 13

B. In *Agripost VI*, Agripost Could Not and Did Not Reserve a Right to Relitigate its Federal Claim 15

1. Agripost could not have reserved a right to litigate its federal takings claim in federal court. 16

2. When Agripost did not appeal the adjudication in *Agripost VI* of its federal takings claim, and conceded on oral argument in *Agripost VII* that it was litigating its federal claim, it effectively withdrew any purported reservation. . . 21

C. *Agripost IX* Was Properly Decided on the Basis of Issue Preclusion. 23

D. The Court of Appeals Properly Affirmed the District Court's Summary Judgment Under the *Rooker-Feldman* Doctrine. 24

II. THERE IS NEITHER CONFLICT NOR CONFUSION BETWEEN *WILLIAMSON COUNTY*, *CITY OF CHICAGO*, AND *SAN REMO*. 27

A. *Williamson County* Was Properly Decided . 28

B. *City of Chicago* Did Not Address Takings . 30

C. *San Remo* is not Confusing. 32

CONCLUSION 35

APPENDIX

Appendix A: Order Granting Defendant's Motion for Final Summary Judgment, *Agripost v. Metropolitan Dade County*, No. 97-22049-CA-22 (June 22, 2001) 1b

TABLE OF AUTHORITIES

CASES

Allen v. McCurry,
449 U.S. 90 (1980) 34, 35

Anderson v. Charter Twp. of Ypsilanti,
266 F.3d 487 (6th Cir. 2001) 21

City of Chicago v. Int'l College of Surgeons,
522 U.S. 156 (1997) 27, 30, 31

Democratic Cent. Comm. of the Dist. of Columbia Bar v. Washington Metro. Area Transit Comm'n,
38 F.3d 603 (D.C. Cir. 1994) 15

Dep't of Health and Rehab. Servs. v. B.J.M.,
656 So. 2d 906 (Fla. 1995) 23

Dist. of Columbia Court of Appeals v. Feldman,
460 U.S. 462 (1983) 7, 22, 24, 25, 26, 27

England v. Louisiana State Bd. of Med. Exam'rs,
375 U.S. 411 (1964) 17, 18, 20, 21

Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,
544 U.S. 280 (2005) 25

Fields v. Sarasota Manatee Airport Auth.,
953 F.2d 1299 (11th Cir. 1992) ... 11, 16, 19, 20

First English Evangelical Lutheran Church v. County of Los Angeles,
482 U.S. 304 (1987) 29, 34

Geiger v. Foley Hoag L.L.P. Retirement Plan,
521 F.3d 60 (1st Cir. 2008) 21

Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,
452 U.S. 264 (1981) 29

Hopkins v. Lee,
6 Wheat. 109, 5 L.Ed. 218 (1821) 16

Int'l Coll. of Surgeons v. City of Chicago,
Nos. 91 C 1587 & 91 C 5564, 1992 WL 6729 (N.D. Ill. Jan. 10, 1992) (order granting motion to dismiss) 30, 31

Jennings v. Caddo Parish Sch. Bd.,
531 F.2d 1331 (5th Cir. 1976) 10, 19, 20

Kremer v. Chem. Constr. Corp.,
456 U.S. 461 (1982) 18

Lewis v. East Feliciana Parish Sch. Bd.,
820 F.2d 143 (5th Cir. 1987) 20

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) ..... *passim*

Marine One, Inc. v. Manatee County,
898 F.2d 1490 (11th Cir. 1990) 15

Mobil Oil v. Shevin,
354 So. 2d 372 (Fla. 1977) 23

Nasser v. Homewood,
671 F.2d 432 (11th Cir. 1982) 25

Penn Cent. Transp. Co. v. City of New York,
438 U.S. 104 (1978) 13, 14

Pennzoil Co. v. Texaco, Inc.,
481 U.S. 1 (1987) 26

Railroad Comm'n of Texas v. Pullman Co.,
312 U.S. 496 (1941) 16, 17, 18

Rooker v. Fiduciary Trust Co.,
263 U.S. 413 (1923) ..... *passim*

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984) 28, 29

San Remo Hotel, L.P. v. City and County of San Francisco,
545 U.S. 323 (2005) ..... *passim*

Smalleylogics Corp. v. Dade County,
176 So. 2d 574 (Fla. Dist. Ct. App. 1965) 14

South Gwinnett Venture v. Pruitt,
491 F.2d 5 (5th Cir. 1974) 25

Stansberry v. Holmes,
613 F.2d 1285 (5th Cir. 1980) 25

Stone v. Powell,
428 U.S. 465 (1976) 35

Suitum v. Tahoe Reg. Planning Agcy.,
520 U.S. 725 (1997) 29

United States v. Mendenhall,
446 U.S. 544 (1980) 19

Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,
473 U.S. 172 (1985) ..... *passim*

Youakim v. Miller,
425 U.S. 231 (1976) 19

CONSTITUTION

U.S. Const., Art. IV, Sec. 1 1

U.S. Const., 5th Amendment ..... *passim*

STATUTES AND ORDINANCES

28 U.S.C. § 1738 ..... 1, 15, 17, 18

42 U.S.C. § 1983 21

Miami-Dade County, Fla. Code § 33-311 6

Miami-Dade County, Fla. Code § 33-311(j) 4

Miami-Dade County, Fla. Code § 33-313 6

RULES

Sup. Ct. R. 10 12

CITIATIONS TO THE OPINIONS AND ORDERS BELOW[1]

Agripost, LLC v. Miami-Dade County, Florida, 525 F.3d 1049 (11th Cir. 2008). (Pet. App. A.)

Agripost, Inc. v. Metropolitan Miami-Dade County, 859 So. 2d 513 (Fla. 2003). (Pet. App. F.)

Agripost, Inc. v. Metropolitan Miami-Dade County, 845 So. 2d 918 (Fla. Dist. Ct. App. 2003). (Pet. App. E.)

Agripost, Inc. v. Metropolitan Miami-Dade County, 195 F.3d 1225 (11th Cir. 1999). (Pet. App. C.)

Agripost v. Metropolitan Dade County, No. 97-22049-CA-22 (June 22, 2001) (Order granting motion for final summary judgment). (Resp. App. A.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Article IV, Section 1: "Full Faith and Credit shall be given in each State to the ... judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such ... Proceedings shall be proved, and the Effect thereof."

28 U.S.C. Section 1738: "[J]udicial proceedings ... shall have the same full faith and credit in every court

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[1] Respondent includes this section principally because Petitioner inadvertently neglected to include reporter citations to the listed opinions.

within the United States and its Territories and Possessions as they have by law or usage in the courts of such State ...."

Respondent Miami-Dade County[2] respectfully requests that this Court deny Agripost's petition for writ of certiorari.

STATEMENT OF THE CASE[3]

In 1991, after Agripost had failed to comply with specific conditions to conditional, revocable, unusual-use zoning, the County revoked its zoning approval. Over the ensuing 18 years and in nine prior legal proceedings,[4] Agripost has sought reversal of that

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[2] Miami-Dade County will be referenced hereafter as the "County." Petitioners are referenced herein as "Agripost." All record citations are to the record on appeal, and all emphasis is supplied unless otherwise noted. Citations and footnotes are generally deleted from block or lengthy quotations.

[3] Because this case involves a lengthy, complicated factual history, and Agripost's version is inaccurate and incomplete, the County submits its own Statement of the Case.

[4] The prior proceedings are referenced herein as follows:

a. *Agri-Dade, Ltd. v. Metro. Dade County, No. 91-214 AP (Fla. Cir. Ct.) ("Agripost II"). (Prior proceedings have referred to Concerned Citizens of Carol City, Inc. v. Dade County and Agripost, Inc., No. 87-139-AP (Fla. Cir. Ct. 1987) as "Agripost I" or "Concerned Citizens.")*

b. *Agri-Dade, Ltd. v. Metro. Dade County, 605 So. 2d 1272 (Fla. Dist. Ct. App. 1992) ("Agripost III").*

decision, as well as millions of dollars in damages. It has lost every time.

In November 1986 Agripost filed with the County a sworn application for unusual use zoning[5] to construct a plant to convert garbage to fertilizer.[6] Agripost chose to locate its plant on a 20-acre site adjacent to: (1) an elementary school in a residential neighborhood; (2) an institution for the learning

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c. *Agripost, Inc. v. Metro. Dade County, No. 94-2031-CIV-DAVIS (S.D. Fla. filed 1994) ("Agripost IV").*

d. *Agripost, Inc. v. Miami-Dade County, 195 F.3d 1225 (11th Cir. 1999) ("Agripost V").*

e. *Agripost v. Metro. Dade County, No. 97-22049 (Fla. Cir. Ct. filed 1997) ("Agripost VI").*

f. *Agripost v. Miami-Dade County, 845 So. 2d 918 (Fla. Dist. Ct. App. 2003) ("Agripost VII").*

g. *Agripost v. Miami-Dade County, 859 So. 2d 513 (Fla. 2003) ("Agripost VIII").*

h. *Agripost, LLC v. Miami-Dade County, Case No. 04-21743-CIV-MARTINEZ/KLEIN (S.D. Fla. filed 2004) ("Agripost IX").*

i. *Agripost, LLC v. Miami-Dade County, 525 F.3d 1049 (11th Cir. 2008). ("Agripost X").*

[5] Unusual-use zoning allows the conduct of a particular use that is not allowed as of right within the underlying zoning district and may be conditional and revocable. (R25-561.)

[6] Agripost's fertilizer manufacturing process involved grinding 4,000 tons of garbage per week into small particles, and then causing a chemically enhanced decay. (R25-2422, 2514, 2290.) *See also Agripost V*, 195 F.3d at 1228 n.4.

disabled; and (3) an institution for disadvantaged women. The application was opposed by more than 600 area residents. (R25-2087-2116, 2119, 2139-2180, 2183, 2185.)

To induce the County to permit its facility in such a sensitive location, Agripost's sworn application represented unconditionally that the plant *could not* produce any "emissions or fumes," "odor problems," or "adverse environmental factors." Agripost represented that: a) all areas of the building would be odor free; b) no emissions or fumes would result; and c) no odor problems were anticipated because the waste-decomposition process employed was aerobic. (R25-2087-2116.)

To hold Agripost to its sworn representations, the County made its approval of the unusual use zoning conditional and revocable. Express conditions included the prohibition of any "nuisance." Agripost's President agreed to the conditions of revocability: "[W]e urge your approval of the unusual use with the conditions.... We are satisfied with those conditions." The County advised Agripost that the conditions would be strictly enforced. The County also entered into a contract with Agripost subject to the same conditions. The contract provided, *inter alia*, that the County would pay Agripost a "tipping fee" to process its garbage. Agripost was on notice that the consequence of violating conditions was revocation of the unusual-use approval. Miami-Dade County, Fla. Code § 33-311(j); (R25-564-65, 1141, 2290-92, 2195, 2199, 2205.)

Agripost joined the County in successfully defending the conditional approval in *Concerned Citizens,* an appeal of the zoning brought by opponents

of the plant. In obtaining affirmance, Agripost repeated its earlier representations, assuring the court that Agripost's system was "simple and reliable ... and environmentally safe." (R25-1577 n.3, 2507-2521.)

It was not. Evidence at subsequent public hearings would reveal that garbage particles were spewing into the atmosphere and being inhaled by school children; the children were suffering from asthma, vomiting, nosebleeds, and allergies; the schools were developing a black, slimy mold; and there was a "gagging," "horrible," and "unbearable" stench, which itself was a health threat. (R25-2415-16, 2429, 2674-78, 2681-82, 2863-94.)

In October 1990, the County's Department of Environmental Resource Management (DERM) notified Agripost that its plant was creating a public nuisance, and of a multitude of other violations of both the zoning and the contract. A month later, the Building and Zoning Director applied to revoke the zoning based upon violation of several conditions, including DERM's original prohibition of any nuisance. (R25-2933-2940, 4046-49.)

Agripost thereupon sought County Commission approval of several contract amendments, reneging upon its contractual "complete responsibility for any costs incurred because of changes in laws", and seeking substantial increases in the tipping fees payable by the County. Agripost also sought a vast plant addition and expansion (from 20 to 50 acres) onto adjacent public property at additional public expense. The proposal was in violation of contract provisions prohibiting substantial changes in the plant, any County financing, and in violation of

incorporated zoning conditions limiting the plant to the existing site. (R25-551, 1980-2020, 3707-09, 3711).

Agripost's expert admitted at the hearing that the plant's emissions were a nuisance, and insisted that its all-or-nothing ultimatum was the only way to fix it. The County Commission declined to approve the amendments, and told its department directors to proceed with the zoning revocation application. (R25-3706-07, 3716-18.)

The County's Zoning Appeals Board and the Commission conducted separate *de novo* public hearings on the application to revoke.[7] These hearings adduced evidence (much introduced by Agripost itself) of the horrific health and safety hazards described *supra,* all of which constituted violations of contract and zoning conditions. Agripost admitted it "did not make good on [its] promise"; it had created a "nuisance" to the public health or welfare. It conceded that, contrary to its earlier promises, there could be no such thing as an odor-free operation of this nature. Based on all of the foregoing, the zoning was revoked. (R25-559-572, 2413-14, 2685-86, 2727.)

Agripost appealed the zoning revocation to a Florida intermediate appellate court, claiming it had a right to cure the violations. *Agripost II.* The court rejected Agripost's claim, and the Florida District Court of Appeal denied certiorari. *Agripost III.*

Undaunted, Agripost filed an eight-count complaint in federal court. *Agripost IV.* The County moved for

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[7] *See* County Code §§ 33-311, 33-313.

summary judgment based on the results of the prior litigation. The court dismissed Agripost's equal protection claim with prejudice; its procedural due process claim as barred by the *Rooker-Feldman* doctrine;[8] and its federal takings claim as unripe under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). The Court declined to exercise supplemental jurisdiction over any of Agripost's state claims, including a state takings claim.

Both Agripost and the County appealed to the Eleventh Circuit Court of Appeals. *Agripost V.* Agripost soon withdrew its appeal, but the County pursued its own, arguing that the court should have granted its motion to dismiss the takings claim with prejudice. The Court of Appeals affirmed the dismissal of the federal takings claim for want of subject matter jurisdiction, but refused to entertain the appeal as to any state law claim. 195 F.3d at 1234, 1227, n.1.

Agripost then filed a four-count action in state court, alleging state inverse condemnation; breach of contract; discrimination; and a purportedly reserved federal inverse condemnation claim incorporating the Florida inverse condemnation claim. *Agripost VI.* The County moved for final summary judgment, arguing no taking had occurred as a matter of law. (R25-475.) The court granted the County's motion, finding that Agripost had no right to violate the conditions upon which the zoning approval was predicated and not

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[8] So-called from the cases that announced the doctrine: *Rooker v. Fiduciary Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

have that approval revoked: "This was "not part of [Agripost's] title to begin with," and does not give rise to a compensable taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992)." (Resp. App. A. at 12b.) The court further noted that "under the particular circumstances of this case, the County's exercise of its retained right to revoke because of Agripost's indisputable violation of conditions does not, as a matter of law, constitute a compensable taking."

The court also adjudicated the purportedly reserved federal takings claim on the same basis as the Florida takings claim.[9] *Id.* at 13b-14b. The court recognized the questionable nature of Agripost's purported reservation, but gave due deference to the federal courts with regard to any claim "lying *exclusively* within the jurisdiction of the federal courts which *could survive* the present litigation." *Id.* at 19b n.7.

Agripost appealed the summary judgment, but did not contest the Court's adjudication of its federal takings claim. *Agripost VII.* On oral argument, the appeals court directly asked Agripost whether it had asserted its federal takings claim in the state case. Agripost admitted that it had:

> *[T]hey are both asserted, both the federal and the state* .... [T]he predicate on which everything depended, Your Honor, was that they were *identical. So we have asserted the federal claim,*

---

[9] Agripost had framed its state takings claim in terms of federal law, alleging, for example, that the "revocation of the unusual use zoning resulted in depriving Plaintiffs, contrary to their reasonable investment-backed expectations, of all economically viable use of the leasehold." (R25-031.)

> but we know that as a practical matter that the State claim, which counts here—I mean, *it's going to be res judicata probably, the decision on the State claim. So that's what counts.*

(R25--3/3/03 3d DCA Tr. at 19-21.)

The appeals court affirmed the summary judgment based upon the unique facts of the case, particularly Agripost's ultimatum to the County. *Agripost VII*. The Court noted, "In the context of a federal inverse condemnation claim, ... when a government entity acts to create property rights yet retains the power to alter those rights, the property right is not considered 'private property,' and the exercise of the retained power is not considered a 'taking' for Fifth Amendment purposes." 845 So. 2d at 920. The court concluded that the County had the right to reject a proposal that would have required the County to pay Agripost more money to cure the odor problem. *Id.* at 920-21. Agripost's petition for review in the Florida Supreme Court was denied. *Agripost VIII*. As in *Agripost V*, Agripost did not seek certiorari review in this Court.

Instead, Agripost filed *Agripost IX*, a second federal action "asserting the [same] federal takings claim asserted" in *Agripost IV*, and "reassert[ing]" the federal claim which had been asserted in and adjudicated in *Agripost VI and VII*. The County moved for final summary judgment based on lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine, issue preclusion, and claim preclusion.

Simultaneously, *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), was pending before this Court. Agripost was aware of its

potential significance. It first moved to delay consideration of the County's motion, because "*San Remo ... is certain to have a significant impact on the instant case.*" After this Court issued its opinion in *San Remo,* Agripost then sought a "Final Adjournment of Oral Argument ... or, in the Alternative, for Leave to Withdraw as Counsel." (R52.) The court denied Agripost's request. (R39, 52, 58.)

Unable and unwilling to argue against *San Remo* in good faith, Agripost then withdrew its request for oral argument. (R60-2.) Agripost did not submit any written argument against the application of *San Remo.* The lower court then granted the County's motion on the papers. (R60, 62.)

In granting final summary judgment, the court expressly based its judgment on claim preclusion. It found that *San Remo* foreclosed Agripost's purported attempt to reserve the right to proceed in federal court, particularly since the federal claim had been expressly decided by the state court. Although the court found it unnecessary to decide the question of issue preclusion, it nevertheless found that its elements had been met as well. The Court also ruled that to the extent Agripost was challenging the propriety of the state court order, that challenge would violate the *Rooker-Feldman* doctrine. (R62.)

The Court of Appeals affirmed. *Agripost X.* It recognized that this Court's reasoning in *San Remo* "seems to undercut much of the support for *Jennings*[10]

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[10] *Jennings v. Caddo Parish Sch. Bd.,* 531 F.2d 1331 (5th Cir. 1976) (stating in dicta that plaintiff could have made an express

and *Fields*."[11] 525 F.3d at 1055. The Court concluded that summary judgment for the County was proper, because a competent state court had found that Agripost did not have a compensable property interest. *Id.* at 1056. Thus, under applicable Florida issue preclusion law, Agripost's federal takings claim necessarily failed.[12]

The Appeals Court expressly rejected Agripost's argument that Florida takings law diverged from federal takings law. It noted that Agripost itself had argued in *Agripost VII* that state takings law "'is governed by *Lucas*,' acknowledging that the state and federal law on the relevant takings issues are coextensive." 525 F.3d at 1049. In addition, the state court of appeals had previously held that the law on this issue was the same. 845 So. 2d 918, 920. The Eleventh Circuit concluded that "it is sufficiently clear under Florida law that Agripost's use of the publicly owned land was 'not part of [its] title to begin with,' *Lucas,* 505 U.S. at 1027, because it did not own the land and because its use was deemed noxious." The Court of Appeals summarized, "Agripost's real gripe here is that the state court erred, but that of course is

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reservation of her federal constitutional claim in state court to avoid claim and issue preclusion).

[11] *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992) (stating that a plaintiff who litigates in state court because of the rule in *Williamson County* can make an express reservation of his Takings Clause claim as an exception to state law claim preclusion principles that would apply under Section 1738).

[12] The court therefore found it unnecessary to decide whether *San Remo* could or should be extended to claim preclusion.

not a defense to collateral estoppel." 525 F.3d at 1055 n.6.

The court also was careful to distinguish the posture of the case before it from *Agripost V*. In the latter, the Court of Appeals had refused to find that the *zoning* proceedings culminating in *Agripost II* precluded Agripost from pursuing a takings claim. In contrast, *Agripost IX* based its application of preclusion not on *Agripost II,* but rather on Agripost's *inverse condemnation action* brought as part of *Agripost VI*, in which the state court

> made a *de novo* ruling on the merits, concluding that because Agripost was *determined to have* violated the conditions of its unusual use permit—a fact that is undisputed—Agripost no longer had a valid, compensable property interest in that use, whether or not the violations amounted to a nuisance under other principles of Florida property law.

Id. at 1056 n.7.

REASONS FOR DENYING THE PETITION

Agripost does not present a compelling reason for granting its Petition. It does not assert circuit conflict, or any other reason listed in Rule 10. Rather, and with little regard for the factual history of this case, Agripost belatedly expresses disagreement with *Williamson County*'s ripeness requirement, and with the Appeal Court's wholly correct application of preclusion.

Part I of the County's response demonstrates why this case is directly and properly controlled by preclusion, and why the Court of Appeals therefore decided the case correctly. Part II demonstrates why Agripost's arguments not only have no applicability to the facts of this case, but are legally deficient as well.

I. THE PETITION SHOULD BE DENIED, BECAUSE THE COURT OF APPEALS CORRECTLY DETERMINED THAT AGRIPOST CANNOT RELITIGATE ITS FEDERAL TAKINGS CLAIM.

A. There Is No Compensable Taking Based Upon Revocation of a Conditional Revocable Zoning Approval for an Isolated Use, Where the Revocation Resulted from the Violation of Conditions and the Creation of a Public Nuisance.

This is hardly a "typical" takings case. Agripost owned no land; it had only conditional revocable zoning and sub-leasehold rights for a single isolated unusual use of state-owned lands. Agripost had agreed that its lease of state lands was terminable upon the cessation of waste processing and that its building "would become the State's property without payment of compensation." (R1-4). Agripost's zoning approval and right to use public lands were always held subject to Agripost not violating any of numerous conditions, including the prohibition against an offensive odor nuisance.

In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), this Court rejected as "quite simply untenable" the suggestion that a taking is

established simply by showing that a landowner has been denied the ability to exploit a particular property interest. *Id.* at 130. This rule follows from the fact that a regulatory taking is based upon the denial of "*all* economically beneficial or productive use of land," *Lucas*, 505 U.S. at 1015, not of a single strand from the rights bundle, which may be fragmented infinitely. When Agripost violated the conditions attached to its limited "strand," Agripost lost whatever right it might have had to constitutional takings compensation.

One has no right to compensation for what one does not own. As this Court put it in *Lucas,* compensation is not required "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." 505 U.S. at 1027. Because the right to violate zoning conditions and *not* have the zoning revoked was never part of Agripost's title to begin with under "background principles" of state law,[13] the revocation did not give rise to a compensable taking. *Lucas*, 505 U.S. at 1029, 1030, 1031.

In granting Agripost's conditional unusual use, the County retained the power to revoke if Agripost violated conditions. "[W]hen a government entity acts to create property rights yet retains the power to alter those rights, the property right is not considered 'private property,' and the exercise of the retained

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[13] *See, e.g., Smalleylogics Corp. v. Dade County*, 176 So. 2d 574, 577, 578 (Fla. Dist. Ct. App. 1965) ("The gist of Plaintiffs' complaint is that it has a substantial vested property right in the [conditional] non conforming use .... [One] cannot now claim that he can violate the conditions without forfeiting his right to the conditional non-conforming use.")

power is not considered a 'taking' for Fifth Amendment purposes." *Democratic Cent. Comm. of the Dist. of Columbia Bar v. Washington Metro. Area Transit Comm'n*, 38 F.3d 603, 606-607 (D.C. Cir. 1994); *see also Marine One, Inc. v. Manatee County*, 898 F.2d 1490 (11th Cir. 1990) (no protected property right in Florida to a permit to build or develop on *public* land).

The zoning revocation was predicated primarily upon violation of the zoning condition prohibiting a nuisance. Even Agripost has previously recognized that under both State and federal law, the prohibition of a common law nuisance does not result in a compensable taking, even as to an unconditional fee owner. It follows *a fortiori* that there can be no compensable taking where one's limited revocable approvals to use public lands are expressly conditioned on not creating a nuisance.

B. In *Agripost VI*, Agripost Could Not and Did Not Reserve a Right to Relitigate its Federal Claim

Notwithstanding the conditional, revocable nature of its property interest, and the adjudications that the County's revocation due to Agripost's violations of those conditions was *not* a taking, Agripost steadfastly and consistently squirms to avoid the effect of those decisions, and therefore of the Full Faith and Credit doctrine.[14] 28 U.S.C. Section 1738 has long been understood to encompass the doctrines of claim

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[14] Agripost does not even include the constitutional and statutory foundations for the Full Faith and Credit doctrine in its list of involved constitutional provisions and statutes.

preclusion and issue preclusion, "because without it, an end could never be put to litigation." *San Remo*, 545 U.S. at 336 (quoting *Hopkins v. Lee*, 6 Wheat. 109, 114, 5 L.Ed. 218 (1821)).

1. Agripost could not have reserved a right to litigate its federal takings claim in federal court.

Agripost seeks to avoid the Full Faith and Credit doctrine by arguing that it was entitled to reserve its right to litigate its federal claim under *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992). *San Remo* makes clear that, except in a narrow class of cases different from this one, such an attempted reservation is invalid.

In *San Remo,* this Court held that when a takings claimant seeks just compensation in state court pursuant to *Williamson County*, he will be precluded in a subsequent federal action from further litigation of issues that were adjudicated by the state court. Agripost vainly attempts to distinguish *San Remo* from its own situation, but the cases are far more alike than different. Like Agripost, San Remo Hotel had first sued in federal court, alleging a federal taking. The district court found the takings claim unripe. *Unlike* Agripost, San Remo Hotel appealed. The determination of unripeness was affirmed, but *Pullman* abstention was ordered as to plaintiffs' facial challenge. The Hotel then filed a takings action in state court, but, like Agripost, "phrased [its] state claims in language that sounded in the rules and standards" of federal takings jurisprudence. The state trial court dismissed the complaint, and the California Supreme Court affirmed the dismissal. The California

high court noted that the Hotel had reserved its federal claims, but because the state had "construed the [federal and state takings] clauses congruently," the court analyzed the state takings claim under both state and federal law. Like Agripost, the Hotel did not seek a writ of certiorari from this Court. Instead, it filed an amended complaint in federal district court, which found the claim precluded. The Ninth Circuit affirmed.

This Court rejected the Hotel's argument that when a Section 1983 takings claimant is required to resort to state court, the claimant should be able to avoid the operation of Section 1738 by making an *England*[15] reservation on the state court record. Rather, an *England* reservation procedure is limited to cases in which the federal court invokes *Pullman*[16] abstention. In a *Pullman* abstention situation, the plaintiff has properly invoked federal court jurisdiction in the first instance, but abstention is necessary for the state court to address a distinct, antecedent state–law issue.

Importantly, this Court noted that "[*Pullman*] made it perfectly clear that the effective reservation of a federal claim was dependent on the condition that plaintiffs take *no* action to broaden the scope of the state court's review beyond decision of the antecedent state law issue." *San Remo* at 340. The Court therefore found the Hotel's attempted reservation ineffective, because "by broadening their state action ... to include

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[15] *England v. Louisiana State Bd. of Medical Exam'rs*, 375 U.S. 411 (1964).

[16] *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

their 'substantially advances' claims, petitioners *effectively asked the state court to resolve the same federal issues they asked it to reserve." Id.*

The Court explained that federal courts may not create exceptions to Section 1738 for policy reasons. "Even when the plaintiff's resort to state court is involuntary and the federal interest in denying finality is robust, we have held that Congress 'must "clearly manifest" its intent to depart from § 1738.'" *Id.* at 345 (quoting *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 477 (1982)). Consequently, the Court applied its "normal assumption that the weighty interests in finality and comity trump the interest in giving losing litigants access to an additional appellate tribunal .... The purpose of the *England* reservation is *not to grant plaintiffs a second bite at the apple in the forum of their choice." San Remo* at 346.

After this Court decided *San Remo*, Agripost's trial counsel attempted to withdraw, withdrew his request for oral argument, and otherwise did not attempt to argue against its applicability to *Agripost IX*. Clearly, Agripost there recognized that its attempted *England* reservation was invalid, because *Agripost VI* was not one of that narrow class of cases filed in state court after a *Pullman* abstention. In addition, Agripost, like San Remo Hotel, had framed its complaint in *Agripost VI* in federal terms. Agripost similarly argued to the state trial court in terms of federal law: "Under the seminal decision of *Lucas v. South Carolina Coastal Council*, governmental action which "denies all economically beneficial or productive use of land" is a taking of property which requires just compensation."Agripost's argument was no different

on appeal in *Agripost VII*, relying extensively on *Lucas* and other federal takings cases.

Agripost has now changed its tune. Its attempt to distinguish *San Remo* is fatally tardy; it is well established that this Court does not decide questions not raised or involved in the lower court.[17] *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976); *United States v. Mendenhall*, 446 U.S. 544, 551–52 n.5 (1980). In addition, the assorted distinctions it attempts to manufacture do not affect in the least the applicability of *San Remo* to the present case.

Agripost alternatively attempts to avoid *San Remo* by arguing that it was entitled to rely on the "settled law" of *Fields*, and it should therefore somehow be "exempt" from *San Remo*. Not surprisingly, Agripost offers no authority for that proposition. *San Remo* was not new law; it simply recognized that prior judicial attempts to "legislate" around the Full Faith and Credit doctrine were invalid. Since Agripost is hoisting this flag for the very first time in this Petition, it is an inappropriate basis for granting certiorari.

Even before *San Remo*, the scope and impact of *Fields* was uncertain. Indeed, the *Fields* court itself acknowledged that it was "unsure of whether we would reach the same result as that reached by the *Jennings* [*v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir.

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[17] In stark contrast to Agripost's present deathbed conversion regarding *San Remo*, the County consistently argued in both *Agripost IX* and *X* that Agripost's attempted *Fields* reservation was prohibited under the Full Faith and Credit doctrine.

1976)] court were the issue before us as a matter of first impression."[18] 953 F.2d at 1306-07. Moreover, the *Fields* court found that the homeowners had failed to make a reservation that would avoid application of "res judicata" principles. *Id.* at 1309.

Agripost's attempted reservation was invalid for another reason: It had inextricably intertwined the relitigation of its state takings claim with its state contract claim.[19] Because the contract claim is not even arguably subject to a *Fields* reservation, the takings claim is "doubly" precluded, *i.e.*, by both the state takings adjudication and the state contract adjudication. Moreover, as discussed *infra* at 24, *Rooker-Feldman* establishes that the federal district court lacked subject matter jurisdiction to reach any contract "issue" decided by the state courts. This fact alone renders all of Agripost's *Williamson* and *San*

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[18] *Jennings* involved a civil rights claim by a teacher who had been fired by the local school board. In a one-page, per curiam opinion, the Fifth Circuit held that because her claims had already been litigated in the state court, the federal district court was barred from reconsidering them. The court added in *dicta* that "[u]nder *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), however, had appellant wished to reserve her constitutional claims for subsequent litigation in federal court, she could have done so by making on the state record a reservation to the disposition of the entire case by the state courts." *Jennings* at 1331. As the Eleventh Circuit noted in *Fields*, a subsequent Fifth Circuit decision "severely questioned the continuing validity of *Jennings*." *Fields* at 1305 n.4 (citing *Lewis v. East Feliciana Parish Sch. Bd.*, 820 F.2d 143, 146 n.1 (5th Cir. 1987)).

[19] Notwithstanding the State court adjudications in *Agripost VI* and *Agripost VII*, Agripost persisted throughout *Agripost IX* in relying on a purported *contractual* right to cure.

Remo complaints irrelevant, and alone justifies denying its Petition.

2. When Agripost did not appeal the adjudication in *Agripost VI* of its federal takings claim, and conceded on oral argument in *Agripost VII* that it was litigating its federal claim, it effectively withdrew any purported reservation.

Both before and after *San Remo*, it was clear that an *England* reservation must be express, explicit, and unequivocal. *See, e.g., Geiger v. Foley Hoag L.L.P. Retirement Plan*, 521 F.3d 60 (1st Cir. 2008); and *Anderson v. Charter Twp. of Ypsilanti*, 266 F.3d 487, 497 (6th Cir. 2001) (holding reservation invalid where party based argument on takings law from United States Supreme Court as well as state court). Even assuming *arguendo* that such a reservation were theoretically possible, Agripost struck out on all three requirements.

The Court of Appeals in *Agripost IX* assumed for the sake of argument that Agripost had properly reserved its right to litigate its federal claim in federal court. 525 F.3d at 1055. The record reveals that its purported reservation was anything but express and unequivocal. Although Agripost's complaint in *Agripost VII* contained language indicating that it "intended" to reserve its federal takings claim for prosecution in the federal district court, that language was unclear.[20] In

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[20] The complaint stated that "Plaintiffs' federal inverse condemnation *is* brought under 42 U.S.C. § 1983 and the Fifth

addition, this ambiguous reservation was negated by Agripost's own conduct and statements as the cause progressed. Agripost submitted the federal claim for adjudication to the state court in *Agripost VI*, and that court adjudicated the claim.[21] The state trial court noted Agripost's equivocation on the subject, stating that it did not reach any "non-Florida claim lying *exclusively* within the jurisdiction of the federal courts which could survive the present litigation."

Agripost's conduct during the state court appeal was even clearer. First, Agripost never appealed the propriety of the state court's adjudication of its federal claim. Second, on oral argument Agripost directly stated that the federal claim was being asserted:

> *[T]hey are both asserted, both the federal and the state*.... [T]he predicate on which everything depended, Your Honor, was that they were identical. So we have asserted the federal claim,

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Amendment of the United States Constitution. It *asserts* that ...." Following this language, the federal taking claim of the state court complaint repeated verbatim the identical substantive language of the state taking claim. As discussed *supra* at 8, the state court adjudicated the federal claim against Agripost on the same grounds as it adjudicated the identical Florida taking claim.

[21] Agripost's federal taking claim did not lie exclusively within federal court jurisdiction, and was properly adjudicated by the state court. *Feldman*, 460 U.S. at 483 n.16 ("[W]e have noted the competence of state courts to adjudicate federal constitutional claims."); *San Remo*, 545 U.S. at 347 ("State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.").

> but we know that as a practical matter that the State claim, which counts here—I mean, it's going to be res judicata probably, the decision on the State claim. So that's what counts.

Thus, despite its arguments in the Petition to the contrary, Agripost is bound by its prior ambiguous allegations, the state court adjudication, its failure to appeal that adjudication, and its ultimate oral concession to the Florida Appellate Court. Having failed to preserve expressly, explicitly, and unequivocally any purported right to litigate federal claims, Agripost's petition based on any such alleged reservation must be denied.

C. *Agripost IX* Was Properly Decided on the Basis of Issue Preclusion.

Although the district court in *Agripost IX* based its decision expressly on claim preclusion, it alternatively found Agripost's claim barred by *Agripost VI* under the doctrine of issue preclusion,[22] and the Appeals Court affirmed on that latter basis. Agripost does not dispute that conclusion here, except to contend that *Agripost V* established that the County could not raise preclusion in *Agripost VI*.

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[22] Under Florida law, issue preclusion applies if, in the prior proceeding, (1) the issues were identical; (2) there was a full and fair opportunity to litigate them; (3) they were critical and necessary to the prior determination; (4) the parties are identical; and (5) the issues were actually litigated. *Dep't of Health and Rehab. Servs. v. B.J.M.*, 656 So. 2d 906 (Fla. 1995); *Mobil Oil v. Shevin*, 354 So. 2d 372 (Fla. 1977).

As recognized by the Appeals Court, Agripost's position is flawed in several respects. First, and most fundamentally, the state court decisions in *Agripost VI* and *Agripost VII* were *not* based on preclusion. In rejecting Agripost's inverse condemnation claim, the trial court clearly stated: "Plaintiffs are not entitled to inverse condemnation damages for the revocation of a conditional revocable zoning approval as a result of their own violation of conditions .... Plaintiffs have no right to violate the conditions upon which the zoning approval was predicated and not have the approval revoked where such action was justified." (R25-1148).

Second, Agripost distorts *Agripost V*. That opinion only found that the appellate review in the prior zoning revocation appeal "was limited to one question: whether the Board's revocation of Agripost's permit was justified. The lower court was not called upon to determine whether there had been a Fifth Amendment taking." 195 F.3d at 1232. Neither *Agripost VI* nor *Agripost VII* adjudicated the takings claim based upon the prior adjudication in *Agripost II*. Each court made an independent de novo adjudication of the takings claim based upon the unique, unalterable facts contained in those records, including Agripost's creation of a nuisance and its insistence that expansion and increased County funding was the only cure.

D. The Court of Appeals Properly Affirmed the District Court's Summary Judgment Under the *Rooker-Feldman* Doctrine.

The district court's decision was also alternatively based on the *Rooker-Feldman* doctrine. Because Agripost has not challenged the application of *Rooker-*

Feldman, this is yet another reason its Petition should be denied.

For Agripost to obtain any relief now would clearly implicate *Rooker-Feldman*, because any relief for Agripost would operate effectively to invalidate the state court judgments in *Agripost VI* and *Agripost VII*. Those decisions each independently adjudicated that Agripost had no valid takings claim and no valid contract claim. *Feldman*, 460 U.S. at 486-87.[23] This Court recently ruled that *Rooker-Feldman* is confined to cases that are "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005); *see also San Remo*, 545 U.S. at 351(noting that "even if preclusion law would not block a litigant's claim, the Rooker-Feldman doctrine might") (Rehnquist, C.J., concurring.).

In that context, it is the obligation upon a State court litigant to raise federal issues in the State court:

> Moreover, the fact that we may not have jurisdiction to review a final state-court

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[23] Federal courts are particularly sensitive to this issue in land use cases, because "zoning provides one of the firmest and most basic of the rights of local control," *Stansberry v. Holmes*, 613 F.2d 1285, 1288 (5th Cir. 1980), and because it is particularly "not the function of federal district courts to serve as zoning appeals boards." *Nasser v. Homewood*, 671 F.2d 432, 440 (11th Cir. 1982) (citing *South Gwinnett Venture v. Pruitt*, 491 F.2d 5, 6 (5th Cir. 1974)).

> judgment because of a petitioner's failure to raise his constitutional claims in state court does not mean that a United States District Court should have jurisdiction over the claims. By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court. This result is eminently defensible on policy grounds. We have noted the competence of state courts to adjudicate federal constitutional claims....

Feldman, 460 U.S. at 482 n.16. Of course, not only could Agripost's federal claim have been raised in the state court, it was in fact raised. The trial court expressly adjudicated it in *Agripost VI*, and, at oral argument in *Agripost VII*, Agripost's counsel acknowledged that fact. Additionally, the issue before the federal court was "inextricably intertwined," with the state court adjudications. *See Feldman*, 460 U.S. at 486. As the late Justice Marshall explained:

> [A] federal claim is inextricably intertwined with the state court judgment if the federal claim succeeds only to the extent that the state wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other that a prohibited appeal of the state court judgment.

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (1987) (Marshall, J., concurring). Clearly, for this Court to allow Agripost to litigate in a federal forum whether its Fifth Amendment rights were violated would

necessarily require the invalidation of the state judgments in several respects. Most fundamentally, the ruling that no compensable taking occurred is totally inconsistent with Agripost's complaint, and any result in Agripost's favor would without question therefore be "inextricably intertwined" with that ruling. Therefore, this Court has no jurisdiction to entertain Agripost's claim, because to do so would improperly invade the state court judgments. Since the issue has now been decided in the state court, any relief given in the present action to Agripost would necessarily call into question the validity of those judgments, a conflict expressly barred under *Rooker-Feldman*.

II. THERE IS NEITHER CONFLICT NOR CONFUSION BETWEEN *WILLIAMSON COUNTY*, *CITY OF CHICAGO*, AND *SAN REMO*.

Refusing to let the facts of this case get in the way of its argument, Agripost steadfastly contends that this case gives this Court the ideal opportunity to resolve "conflict and confusion" caused by *Williamson County*; *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997); and *San Remo*. As the County has demonstrated *supra*, the lengthy and complicated history of this case demonstrates that it is certainly *not* an appropriate case to resolve any such alleged conflict or confusion, even if any existed. To the contrary, not only is this case unique and extraordinarily fact-based, but it also demonstrates the *validity and wisdom* of exercising federal restraint and allowing state courts to define the property interests at stake, and to determine whether they were taken in the first instance. In addition, as the County

now demonstrates, any "conflict and confusion" is largely illusory.

A. *Williamson County* Was Properly Decided.

Petitioner resurrects the same objections to *Williamson County* repeatedly asserted and rejected in *San Remo*[24] and other petitions. *Williamson County* held respondent's takings claim unripe for two independent reasons: a) respondent had refused to request a variance, and the government therefore had not reached a final decision regarding the application of certain regulations to the property; and b) respondent had not sought compensation by bringing an inverse condemnation action in state court for an alleged taking of property.

Petitioner and the amici supporting him rail against the state litigation requirement in *Williamson*. They overlook that the requirement is a product of the plain language of the Takings Clause: "[N]or shall property be taken for public use, without just compensation." Thus, the Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. 473 U.S. at 194. If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking. *Id.* at 194-95 (quoting *Ruckelshaus v. Monsanto Co.*,

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[24] Indeed, much of Agripost's Argument is *identical* to an amicus brief submitted in support of the losing side in *San Remo*. *See* Brief of Amicus Curiae Franklin P. Kottschade in Support of Petitioners, 2005 WL 176431.

467 U.S. 986, 1013, 1018 n.2 (1984)).[25] Indeed, in *Monsanto,* this Court held that takings claims against the Federal Government are premature until the owner has availed himself of the process provided by the Tucker Act. *Id.* at 1016-20. By Agripost's reasoning, there is no basis for that decision, either..

Agripost complains that it "finds itself unable to seek relief for the violation of its federal rights in any court." (Pet. at 31.) Agripost ignores the fact that its right under the Fifth Amendment is wholly dependent a) on the nature of its property interest under state law; b) on a determination under state law of whether that interest was taken; and c) if and only if it suffered a taking of its property interest, whether the state provided just compensation.

Indeed, *all* of Agripost's grievances about *Williamson County* are misplaced, because the real question in this case was whether the County's action constituted a taking. The answer to this question was quite properly deferred to the state court, inasmuch as it required the application of state property law.

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[25] *See also Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 n.40 (1981) ("an alleged taking is not unconstitutional unless just compensation is unavailable"); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (the Takings Clause "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking."); *Suitum v. Tahoe Reg. Planning Agcy.*, 520 U.S. 725, 734 (1997) (state-litigation requirement "stems from the Fifth Amendment's proviso that only takings without 'just compensation' infringe that Amendment").

Agripost argues that "there is nothing in the 5th Amendment directing that the only place to seek that determination (of a violation) is in state court." (Pet. at 17.) As pointed out *supra* and in *Williamson*, the very nature of and limits on Agripost's Fifth Amendment right necessarily compel that conclusion. Moreover, the time for Agripost to have made that argument was back in 1997, when the district court in *Agripost IV* dismissed its claim as unripe. Agripost initially did appeal, but then withdrew it, apparently electing to take its chances in state court. Having lost, it cannot now complain.

B. *City of Chicago* Did Not Address Takings.

Agripost next suggests that *City of Chicago* is wholly at odds with *Williamson County*. It expresses disbelief that this Court could ignore *Williamson County* in ruling that the City was entitled to remove from state to federal court an action that sought review of a Chicago Landmarks Commission decision not to allow demolition of a designated historical landmark.

Agripost misunderstands the procedural history of *City of Chicago*. While the initial complaints removed to federal court included federal takings claims,[26] they

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[26] In their takings claim, the Chicago plaintiffs contended that the Landmarks Ordinance's standard for economic hardship was facially unconstitutional, because it required an applicant to prove that denial of the permit would result in the loss of all reasonable and beneficial use of or return from the property. They further argued that it operated as a "taking" because it barred implementation of redevelopment plans adopted before designation of the property as historic. *Int'l Coll. of Surgeons v.*

contained other federal claims as well, including due process and equal protection claims, obviously not subject to *Williamson County*. Thus, Agripost is wrong when it argues that the *City of Chicago* plaintiffs "could *not* have sued the City of Chicago in federal court." (Pet. at 23.)

In addition, defendants moved early on to dismiss those claims on the merits. The District Court granted the motion, stating:

> Plaintiffs had not alleged that the Landmarks Ordinance had deprived them of *all* reasonable and beneficial use of or return from the property, and "mere disappointed expectations do not amount to an unconstitutional "taking."[3]

[3] Because plaintiffs' "takings" claims are dismissed for failure to state a claim, the court does not consider defendants' argument that plaintiffs' failure to pursue a state court inverse condemnation action renders the claims "unripe" for adjudication.

Int'l Coll. of Surgeons v. City of Chicago, Nos. 91 C 1587 & 91 C 5564, 1992 WL 6729, *4 (N.D. Ill. Jan. 10, 1992). Whether the district court got the analysis backward or not, there is no indication in any of the available briefs that either side raised the taking ruling on appeal to the Seventh Circuit. Petitioner City of Chicago obviously did not raise it before this Court,

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City of Chicago, Nos. 91 C 1587 & 91 C 5564, 1992 WL 6729, *3 (N.D. Ill. Jan. 10, 1992).

since it had prevailed below on the takings claim. Since Respondent did not file a cross petition, it is clear that the issue simply was not presented.

Thus, Agripost's contention that this Court "accurately and sensibly concluded that 5th Amendment cases are properly brought in federal court in the first instance" (Pet. at 24) is disingenuous; this Court reached no such conclusion and was never even presented with that issue. Agripost is similarly disingenuous when it argues that this "Court held [in *City of Chicago*] that a municipal defendant could remove *such a 5th Amendment* claim from state court for federal litigation." (Pet. at 9.) There was no such holding, because no such issue was ever before the Court.

C. *San Remo* is not Confusing.

Agripost is on equally shaky ground in trying to paint *San Remo* in "confusing" colors. Agripost seems to have forgotten that it took the position below that *San Remo* was "certain to have a significant impact on the instant case." It fails to explain how it now finds *San Remo* confusing, but did not in *Agripost VIII* or *Agripost IX*. And Agripost simply ignores the controlling holding of *San Remo*: there can be no exception—not even in takings cases—to the rule that the Full Faith and Credit Statute precludes litigation of issues adjudicated by state courts.

This Court found no reason to "create an exception to the full faith and credit statute, and the ancient rule on which it is based, in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state

judgment denying just compensation." 545 U.S. at 337. More broadly, this Court recognized that "this is not the only area of law in which we have recognized limits to plaintiffs' ability to press their federal claims in federal courts." *Id.* at 347. Requiring a takings plaintiff to pursue state compensation remedies was justified because "[s]tate courts are fully competent to adjudicate constitutional challenges to local land-use decisions" and "undoubtedly have more experience than federal courts do in resolving the complex factual, technical and legal questions relating to zoning and land-use regulations."[27] *Id.*

Agripost, naturally echos Chief Justice Rehnquist's concurring opinion suggesting a reconsideration of *Williamson County* in the "appropriate case." But Agripost incongruously ignores the fact that, just like the petitioner in *San Remo,* Agripost never challenged the correctness of *Williamson County* below. Just as in *San Remo,* resolving any purported *Williamson County* issue here could not possibly help Agripost, because it already went to state court and lost. Clearly, if the Court were inclined to reconsider *Williamson County* at all, the only potentially "appropriate case" would be a case in which the property owner challenged at the outset an order to repair to state court. Only in that posture could "resolving the issue" benefit a petitioner. From any perspective, this collateral, belated challenge by Agripost is *not* the "appropriate case."

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[27] State property law provides the guiding principles in taking cases. *Lucas*, 505 U.S. at 1029 (need for reference to "the restrictions that *background* principles of the State's law of property and nuisance already place upon land ownership" to determine if regulatory act results in taking).

More fundamentally, whereas the *San Remo* concurrence suggested future reconsideration of whether a plaintiff must first seek *compensation* in state court, the issue for Agripost was not compensation, but whether there was a taking in the first place. Indisputably, in light of *Lucas* and *First English* among many others, *that* issue is indeed best left to the state courts to address. The state-litigation requirement does not weaken a property owner's entitlement to just compensation. Rather, it enforces the language of the Takings Clause by holding that a constitutional violation occurs only when a property owner has had its property taken *and* has been denied just compensation. It respects the role of state courts and legislatures in ensuring the availability of adequate remedies. Moreover, it still allows a federal remedy if a state fails to meet its constitutional obligation to provide an adequate just compensation remedy after having taken property. *First English*, 482 U.S. at 314-16.

This Court has noted that there is "scant precedent" for limiting takings claims to federal court. *San Remo*, 545 U.S. at 347. The state-litigation requirement is entirely consistent with the central role of state law in determining whether regulatory action results in a taking, and the confidence placed in state courts to enforce constitutional rights in our federal system. *Allen v. McCurry*, 449 U.S. 90, 105 (1980).

Petitioners argue that *San Remo's* enforcement of the Full Faith and Credit Act turns *Williamson County* into "a jurisdictional trap, rather than [a] ripeness prerequisite." That is not so. As the record clearly reveals, Agripost suffered no such trap. Their hypothetical assertions run directly contrary to this

Court's "emphatic reaffirmation ... of the constitutional obligation of the state courts to uphold federal law, and its ... confidence in their ability to do so." *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (*citing Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976)).

Agripost concludes bizarrely by contending, without supporting authority, that because it chose not to appeal *Agripost IV*, and instead chose to go to state court, it "should not be bound by *San Remo*." (Pet. at 30-31.) It continues, "This case was initially brought in federal court, and there it should have stayed." As the County has shown, it was perfectly correct for the state courts to decide the state issues involved in Agripost's claim, but if Agripost indeed believed that it should have remained in federal court, then it needed to have made that argument over ten years ago in response to *Agripost IV*.

CONCLUSION

As this Court concluded in *San Remo*, "the weighty interests in finality and comity trump the interest in giving losing litigants access to an additional appellate tribunal ... [and] a second bite at the apple in the forum of their choice." 545 U.S. 345-46. It was entirely proper for competent state courts at both the trial and appellate levels to have determined that Agripost did not suffer a taking. Federal courts properly found that Agripost could not have reserved the right to relitigate those claims. The record further shows that they *did* not unequivocally reserve that right. The County therefore respectfully requests that this Court DENY Agripost's Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

Case No. 97-22049-CA-22

[Dated June 22, 2001]

AGRIPOST, a Florida corporation, and AGRI-DADE, LTD., a Florida limited partnership,	)
Plaintiffs,	)
v.	)
METROPOLITAN DADE COUNTY, through its Manager and Board of County Commissioners,	)
Defendant.	)

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE came before the Court upon Defendant Metropolitan Dade County's Corrected Amended Motion to Dismiss Action with Prejudice or

for Summary Final Judgment Based Upon Prior Litigation, and to Strike. Having heard oral argument, reviewed the file and considered the legal memoranda of counsel and the records of prior State and federal litigation, and being otherwise duly advised, the Court grants the motion for summary judgment and denies the motions to dismiss and to strike.

The Court is cognizant that although summary judgment is infrequently granted where there has been no opportunity for discovery, it nonetheless should be granted where the facts are so clear and undisputed that only questions of law remain. *See Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985). It is the moving party's burden to conclusively show that no genuine issue of material fact exists, and until such a showing is made the legal sufficiency of the evidence on the merits should not be addressed. *See Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966). Furthermore, the court must consider all record facts in the light most favorable to the non-moving party, and draw all reasonable inferences against the moving party. *See, e.g., Fisel v. Wynns*, 667 So.2d 761, 764 (Fla. 1996). Although no discovery has been conducted in this cause, the Court finds that there is no genuine issue of material fact as to the content of the records of prior litigation, which conclusively resolve the issues in the present case as a matter of law.

I. History

In March 1987, Plaintiffs[1] obtained from the County a conditional, revocable, unusual use zoning approval, or permit, to operate a solid waste processing facility intended to convert garbage into a fertilizer-like product. The waste conversion process, called "composting," involved the chemically-enhanced decay of finely-ground raw garbage at the rate of 4,000 tons per week. Plaintiffs proposed to build a demonstration facility that could be used as a model for other communities interested in developing environmentally sound alternatives for waste disposal. Plaintiffs represented that a) their process "prevents the formation of odor-causing gases," b) "no emissions or fumes of any kind will result [and] [n]o odor problems are anticipated," and c) "the applicant will . . . create a pleasant park-like setting in the general neighborhood." U.S. Dist. Ct. App. A at 24-27.

Plaintiffs thus obtained the zoning approval for a 19.79-acre site adjacent to an 800 student elementary school, surrounded on three sides by single-family homes, a state institution for the learning disabled, and a state institution for disadvantaged women. The site was bounded on the fourth side by a closed landfill cell and another cell used for non-garbage, yard waste, purposes. The County's approval was subject to numerous conditions, and was revocable upon violation of those conditions. The zoning conditions required,

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[1] Plaintiffs Agripost and Agri-Dade are related separate entities claiming separate damages. Unless otherwise indicated they are referenced herein jointly and severally as "Plaintiffs," because of their common allegations.

inter alia, that the operation be strictly limited to the approved site and approved site plan, and they incorporated all requirements of the County's Department of Environmental Resources Management (DERM). DERM required that: 1) the operation of the facility not cause a nuisance, 2) no solid waste or compost products be stored outdoors where they could be exposed to rainfall; and 3) the compost product be covered and stored on an impermeable base.

The zoning was approved based upon Plaintiffs' own urging that they be subject to the specified conditions. Upon issuing the conditional revocable zoning approval the County advised Plaintiffs of their right to appeal and warned: "Please *note the conditions* under which said approval was granted, inasmuch as *strict compliance, therewith, will be required.*" U.S. Dist. Ct. App. A, at 142, which follows p. 99. Although Plaintiffs could have appealed the conditions of their zoning approval, which are challenged in the present complaint, they instead joined the County in successfully defending the approval resolution against an appeal by an affected citizens group. The revocable zoning approval, as conditioned, was approved by the Eleventh Circuit Court Appellate Division in *Concerned Citizens of Carol City, Inc. v. Dade County and Agripost, Inc.*, Case No. 87-139-AP (1987).

The plant location was on public lands that Plaintiffs had subleased from the Florida Department of Health and Rehabilitative Services in October of 1986. The sublease was conditioned on Plaintiffs securing a "rezoning" from the County, Ex. 2 to Comp. ¶ 3, and, like the zoning approval, permitted only a single use. Similarly, the sublease was conditional and

revocable in the event that Plaintiffs should "make or suffer any unlawful, improper, or offensive use of the premises or any use or occupancy thereof contrary to the . . . ordinances of the . . . county." *Id.* at ¶ 12. The lease was thus revocable in the event Plaintiffs should violate the zoning conditions.

On July 7, 1987, Plaintiffs entered into a contract with the County providing for the County to both supply garbage to the facility and to pay a processing, or "tipping," fee based upon tonnage.[2] The contract expressly incorporated the zoning approval and required Plaintiffs to comply with all conditions contained therein. Like the conditional zoning approval that it incorporated, the contract expressly limited the facility to the approved site and the approved site plan even though Plaintiffs had an option to lease an additional 30 acres of state land. It also prohibited any facility modification or enhancements that were not "minor." § 3.11. The contract provided that the County would have no financial responsibility for design, construction, operation, or financing of the facility, and included an agreement by Plaintiffs to release the County from any liability either pertaining to or arising out of plant operations, and also to defend and hold the County harmless from such claims. Under the Contract Plaintiffs were obligated to perform a monitoring and control program. Art. III, § 3.17, Sch. C, § V.F.

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[2] The original zoning, sublease, and contract were all obtained by Plaintiff Agripost, which subsequently assigned all of its rights, title and interest in both the contract and the sublease to the Plaintiff Agri-Dade.

In October 1990, DERM gave Plaintiffs official notice by certified mail that the facility was generating obnoxious odors and creating a public nuisance in violation of a) the County Code, b) multiple contract provisions, including Schedule C, and c) the zoning approval. DERM also notified Plaintiffs of other violations pertaining to failure to keep permits in effect, site and usage limitations, and failure to comply with product testing requirements. DERM advised Plaintiffs that modifications of the plant and of Plaintiffs' contractual financial responsibilities, which Plaintiffs had proposed to address the violations, were not permitted by the existing Contract. These proposed changes in Plaintiffs' relationship with the County would have necessitated a revision to the Contract which could have been approved only by the County Commission, even though County staff cooperated with Plaintiffs in developing the proposed amendments. Finally, DERM warned that Plaintiffs' failure to implement the proposals, *i.e.*, failure to obtain Contract amendments, would result in "DERM ordering your facility to cease operations and your case being prepared for formal enforcement action in a court of competent jurisdiction." U.S. Dist. Ct. App. C at 69.

Plaintiffs did not take either an administrative or judicial appeal from DERM's finding of a public nuisance and other zoning and contract violations. The County Code provided for both administrative and judicial appeals. § 24-6. Plaintiffs did seek contract amendments involving a considerable expansion of the plant onto adjacent public lands to be financed by substantially increasing the County's tipping fees. At a December 20, 1990, County Commission meeting to consider the contract amendments, Plaintiffs

acknowledged creating a nuisance, and represented that the plant would close in the event these amendments were not approved.

After declining to agree to the contract amendments, the County proceeded with a previously-filed application by the zoning director to revoke the conditional zoning approval. On January 16, 1991, a hearing was held before the County's Zoning Appeals Board, which decided that the zoning should be revoked. On administrative appeal, the County Commission conducted a *de novo* hearing pursuant to the County Code, reached the same conclusion, and revoked the zoning on May 23, 1991. The zoning hearings included various expert studies and other substantial competent evidence that the plant created the following problems:

(1) spewing into atmosphere of finely ground inhalable garbage particles, which were inhaled by the school children;

(2) emission of "gagging," "horrible," "unbearable," "rotting," "stench";[3]

(3) asthma, vomiting, nosebleeds, and allergies in school children;

(4) almost uncontrollable black slimy mold throughout school and neighborhood; and

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[3] Camp, Dresser McKee Expert Report, 5/6/91, It. 17, p. 11, Pltfs.' Ex. 1A filed in U.S. Dist. Ct. App. A, U.S. Dist. Ct. App. C, BCC Tr. at 48. *See also* 49-82.

(5) indirect health threat from odor alone, independent of particle emissions.[4]

The zoning revocation record also included Plaintiffs' admissions that: a) they "did not make good on [their] promise"; Dist. Ct. App. C, ZAB Tr. at 50, b) they had created a public nuisance, and c) there is no such thing as an odor-free operation of this nature. Further, the record included DERM's concern about long-term effects on the public health and welfare even if Plaintiffs were allowed to modify the plant, and DERM's caution that such impacts could not be ascertained until after the plant had resumed operations.

Plaintiffs appealed the zoning revocation to the Appellate Division of the Circuit Court, which affirmed the zoning revocation. *Agri-Dade, Ltd. v Metropolitan Dade County*, Cir. Ct. Case No. 91-214-AP (hereinafter cited as "Cir. Ct. Op."). Plaintiffs then filed a petition for writ of certiorari to the Florida Third District Court of Appeal, which denied the petition. *Agri-Dade Ltd. v. Metropolitan Dade County*, 605 So. 2d 1272 (1992).

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[4] Fla. Dept. of H.R.S. Expert Rpt. 11/2/90, U.S. District Ct. App. C at 64, Pltfs.' Ex. 1A, It. 15, p.6, U.S. District Ct. App. A. The record also included proof that: (a) by January 1990, Plaintiffs had failed to obtain renewal of required DERM operating permit, U.S. District Ct. App. C at 31; (b) the Florida Department of Environmental Regulation had documented multiple violations, *Id.* at 107, 121; (c) Plaintiffs had "dumped" vast uncovered mounds of unfinished product on public lands to the west of the approved plant site in violation of conditions requiring an impermeable base and impermeable cover, *Id.* at 165, 313; and (d) Plaintiffs had failed to submit data to DERM's fertilizer evaluation program. *Id.* at 28.

Plaintiffs subsequently initiated and concluded a Chapter 11 plan of arrangement bankruptcy proceeding for the purpose of financing additional litigation against the County. On September 30, 1994, they filed an eight-count complaint against the County in the United States District Court for the Southern District of Florida. *Agripost, Inc. v. Metropolitan Dade County, U.S. Dist. Ct. Case No. 94-2031-Civ-Davis/Johnson* (hereinafter cited as "Dist. Ct. Op."). The United States District Court entered an order on September 5, 1997 dismissing the complaint in its entirety on various grounds, some counts with prejudice and some without. The District Court rejected the County's preclusion defenses to Plaintiffs' Federal Fifth Amendment taking claim. Although that court did not exercise jurisdiction over Plaintiffs' State law claims, it opined that the County's preclusion defense to the Florida taking claim was incorrect because the zoning appeal dealt with the propriety of the zoning revocation and not the issue of a taking.

The County appealed, and Plaintiffs cross-appealed but subsequently withdrew their appeal. The United States Court of Appeals rejected the County's contention that the Federal Fifth Amendment taking claim was precluded by the decision of the Florida Circuit Court Appellate Division and affirmed the District Court's order, holding that the claim was unripe prior to the conclusion of the zoning appeal, was therefore not litigated therein, and was not otherwise collaterally estopped. *Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225 (1999). The U.S. Supreme Court subsequently denied certiorari. 121 S.Ct. 51 (2000).

II. The Present Case

Plaintiffs filed the present Complaint on September 25, 1997, shortly after the entry of the United States District Court opinion. This case was stayed pending final disposition of the federal appellate litigation. Upon the conclusion of that litigation, the stay was lifted, although discovery was held in abeyance until after a decision upon the County's motion to dismiss or for summary judgment and to strike presently under consideration.

The Complaint asserts four counts, each of which seeks damages of $140,000,000.00, together with prejudgment interest, costs, and attorney's fees. Plaintiff Agri-Dade seeks damages for the loss of an alleged $40 million investment, and Plaintiff Agripost seeks $100 million in damages for the loss of the alleged value of its "enterprise," consisting of a future business which it hoped to develop "to build similar facilities in numerous communities in the United States and abroad using its Dade County facility as a model." Comp. ¶¶ 12, 102.

Although the Court will discuss the counts individually, it will first address certain conflicts between the common material allegations of all counts and the prior adjudications. First, each of the counts is predicated upon and incorporates allegations that Plaintiffs' private facility was "similarly situated," to County-owned facilities for purposes of receiving public financial support. ¶ 13; *see also* ¶¶ 14, 95, 113(c) & (d). The United States District Court has expressly held, however, that, for a number of physical and legal reasons, "Plaintiffs' facility and the County's facilities are *not* similarly situated." U.S. Dist. Ct. Op. at 13

(emphasis supplied). In addition, each count is predicated upon and incorporates allegations that both the original 1987 conditional revocable zoning approval affirmed in *Concerned Citizens*, and the zoning revocation affirmed in *Agri-Dade*, effectively denied Plaintiffs due process. Comp., ¶¶ 34, 77, 87. In contrast, the United States District Court has held that the Florida Circuit Court adjudication "necessarily determined that no procedural due process violation had occurred." U.S. Dist. Ct. Op. at 8. Finally, each count is predicated upon and incorporates allegations that Plaintiffs' violation of conditions "did not justify" the "improper" revocation, Comp., ¶¶ 77, 103, 104, even though the Circuit Court Appellate Division adjudicated that the County Commission "*was* justified" in revoking the zoning, and the United States Court of Appeals agreed that the issue of justification had been adjudicated. 195 F.3d at 1232.

Count I (Florida Inverse Condemnation).

Count I seeks damages under Florida inverse condemnation law, alleging that the "revocation of the unusual use zoning resulted in depriving Plaintiffs, contrary to their reasonable investment-backed expectations, of all economically viable use of the leasehold interest in the Lease, of the facility . . . , of Plaintiffs' rights under the Contract, the Lease, and the unusual use zoning, and of the goodwill associated with Plaintiffs' businesses. . . ." Comp., ¶ 106. Plaintiffs allege deprivation of their investment-backed expectations because the County provided hundreds of millions of dollars of public financing for County-owned facilities, but did not provide such public financing for Plaintiffs' privately-owned facility,

which, as discussed *supra*, is alleged to be similarly-situated to the public facilities.

The Court finds, as a matter of law, that Plaintiffs are not entitled to inverse condemnation damages for the revocation of a conditional revocable zoning approval as a result of their own violation of conditions. Plaintiffs owned no land, and had only conditional revocable zoning and leasehold rights for a single isolated use of public lands. At no time did Plaintiffs have an unconditional right to operate the garbage composting plant, but their rights were always conditioned upon their not violating numerous conditions, including the prohibition against an offensive odor nuisance. When the County granted Plaintiffs certain conditional rights, it clearly retained the right to revoke the zoning, subject to judicial review, in the event Plaintiffs should violate the conditions. Indeed, the Circuit Court, in holding that the revocation was justified, adjudicated that Plaintiffs were "always on notice that [their] permit was conditional on meeting certain requirements [and subject to] revocation for failing to meet conditions. . . ." Cir. Ct. Op. at 2-3.

To allow Plaintiffs to recover for the loss of a business that did not develop as a known consequence of Plaintiffs' violation of conditions would reward them for their own wrongdoing. Plaintiffs had no right to violate the conditions upon which the zoning approval was predicated and not have that approval revoked where such action was justified. This was "not part of [Plaintiffs'] title to begin with," and does not give rise to a compensable taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992).

The alleged interference with reasonable, distinct investment-backed expectations is a necessary element of a regulatory taking claim. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 128 (1978); *accord State Dept. of Env. Protection v. Burgess*, 772 So. 2d 540, 542 (Fla. 1st DCA 2000). Under "background principles" of Florida law, *see Burgess* at 542, *citing Lucas* at 1029, Plaintiffs could not have a reasonable investment-backed expectation to violate the zoning conditions without having the zoning revoked, particularly where the revocation was adjudicated to have been justified. *See also Smalleylogics Corp. v. Dade County*, 176 So.2d 574 (Fla. 3rd DCA 1965) (holding that there is no taking of a vested property right where zoning is revoked based upon the violation of the conditions of approval).

An inverse condemnation claim is particularly inapplicable where government acts to abate a public nuisance and prevent a public harm. *Lucas* at 1031-1032; *see also Dept. of Agriculture & Consumer Services v. Mid-Florida Growers, Inc.*, 521 So. 2d 101, 103 (Fla. 1988), *citing Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1381 (Fla. 1981), *cert. denied sub nom. Taylor v. Graham*, 454 U.S. 1083, 102 S. Ct. 640 (1981) ("if a public harm is prevented [regulatory action] is more likely an exercise of the police power [than the power of eminent domain]"). The Court notes that Plaintiffs failed to appeal DERM's finding that they had created a public nuisance and, indeed, admitted this during County administrative proceedings. Significantly, the Florida Circuit Court Appellate Division recognized that the County acted to protect "the comfort, perhaps health, of 800 school children. . . ." Cir. Ct. Op. at 2. The Court concludes that under the particular circumstances of this case,

the County's exercise of its retained right to revoke because of Plaintiffs' indisputable violation of conditions does not, as a matter of law, constitute a compensable taking. The Motion for Summary Judgment is therefore granted as to Count I.

Count II (Breach of Contract)

Count II seeks contract damages, alleging matters common to both the validity of the zoning revocation and the breach of contract claim: a) insufficient notice of violations; b) the failure to adopt regulatory standards pertaining to Plaintiffs' compost product, Agrisoil; c) the imposition of conditions in addition to those established by the prior zoning resolution; d) the failure to determine compliance with conditions and the source of the odors; e) opportunity to cure; f) discriminating against Plaintiffs in relation to the County's solid waste facilities; and g) justification for the revocation. The Complaint effectively seeks relief on the ground that the County was impliedly obligated by contract not to exercise its police power to revoke the zoning but, instead, to agree to contract amendments sought by the Plaintiffs. These amendments would allegedly have allowed Plaintiffs to attempt to avoid continued problems through curative measures involving an expansion of the facility onto adjacent public lands at County expense, in derogation of various express contract and zoning prohibitions.

Because a) the validity of the zoning revocation and the contract claim involve common dispositive issues, b) the contract expressly incorporated the zoning approval, requiring compliance with its conditions, and c) Plaintiffs claim the zoning revocation violated the

contract, they could have raised their contract issues and claims both in the administrative proceedings and in the zoning appeal.[5] Plaintiffs in fact did extensively argue their contract claims and issues both in their appeal to the Circuit Court and in their unsuccessful petition for certiorari to the Third District Court of Appeal. Tracking the language of Schedule C, Sec. V.F. of the Contract, upon which Plaintiffs rely, the Circuit Court held that the County was justified in rejecting the alleged curative measures and revoking the zoning.[6] Because Count II would necessitate

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[5] Plaintiffs could have raised these matters in seeking the administrative remedy of more notice, reversal of the findings in the DERM notice, a contract amendment, or a decision not to revoke the zoning. Asserting a contract claim during the administrative proceedings as an additional ground for an administrative remedy and to make a record for purposes of judicial review would not have necessitated an adjudication by the administrative tribunal of whether its own actions would constitute a breach of contract. Rather, Plaintiffs' putting the County on notice that denial of the requested administrative relief might breach the contract could have provided an additional basis for relief, could have avoided future litigation, and could have created a record for subsequent judicial determination of the issue if the administrative remedy were denied and Plaintiffs chose to litigate the issue on appeal, as did the Plaintiffs in the present case.

[6] Section V.F. of Schedule C of the Contract confirmed that "objectionable odors should not be detected," set forth certain monitoring obligations of Plaintiffs, and concluded that "continual generation of obnoxious odors, if not corrected within a reasonable time after written notice by the County, shall constitute a default by Agripost." The Circuit Court held: "In particular, where there was a requirement not to create obnoxious odors, and where those odors continued for an unreasonable length of time, when the President of Agri-Dade, who presented a plan to remove the odor, said it would take months and a substantial monetary

expenditure to retrofit the plant, the Commission was justified [in revoking]." *Id.* at 2. Plaintiffs voluntarily raised their contract claim and the court decided it as a matter of law based upon admitted fact. The present litigation therefore involves relitigation of this matter.

Plaintiffs' contract claim was also the essence of its contract estoppel argument, which the Circuit Court expressly rejected, holding that Plaintiffs were "*always on notice* that [their] permit was conditional on meeting certain requirements. Revocation for failing to meet conditions does not invoke estoppel." Cir. Ct. Op. at 2-3. By claiming now that the zoning revocation entitles them to contract damages Plaintiffs ask this Court to find that they were *not* "always on notice" of the County's right to revoke but that they had an implied contractual right *not* to have their zoning revoked, despite the Circuit Court's express rejection of their contract estoppel argument.

Further, in *Smalleylogics Corp. v. Dade County*, 176 So. 2d 574, 578 (Fla. 3d DCA 1965), the Court had rejected a claimed violation of vested rights, holding that one "cannot now claim that he can violate the conditions without forfeiting his right to the conditional [zoning approval]." Contending that the Contract had altered the County's police power to revoke zoning for violation of conditions under the Florida law, Plaintiffs argued: "While this may in general be true, [*Smalleylogics*] cannot apply where a county . . . *disregards provisions of the contract* . . . specifically intended to address the conditions resulting in non-compliance." U.S. Dist. Ct. App. D at 31 n.17 (emphasis supplied). Rejecting this contract argument, the Florida circuit court denied relief, expressly finding *Smalleylogics* to apply. The present case effectively seeks to relitigate this matter.

Finally, the United States District Court litigation precludes Plaintiffs' claim of insufficient notice (due process) and an implied contractual right to be treated similarly to County facilities because Plaintiffs allegedly were similarly situated. As discussed *supra*, the United States District Court expressly found the former claim to have been previously adjudicated and the latter

relitigation of matters that could have been or were raised both in administrative proceedings and in the zoning appeal, as well as claims adjudicated, or held to have been adjudicated, against Plaintiffs by the Federal Courts (lack of notice, being "similarly situated," and justification of the revocation), Defendant's Motion for Summary Judgment is granted as to Count II.

Count III (Discrimination in Violation of § 403.7063, Florida Statutes)

Count III alleges discrimination against Plaintiffs' private waste processing facility in violation of section 403.7065(1), Florida Statutes (1989), which states:

> In providing services or programs for solid waste management, local governments and state agencies should use the most cost-effective means for the provision of services and are encouraged to contract with private persons . . . to assure that such services are provided on the most cost-effective basis. [N]o county or municipality shall adopt or enforce regulations that discriminate against privately-owned solid waste management facilities because they are privately owned. However, nothing in this section shall interfere with the county's or municipality's ability to control the flow of solid waste within its boundaries pursuant to this chapter.

---

to be without merit. The United States Court of Appeals found that the issue of justification had been decided against Plaintiffs.

Count III of the Complaint repeats the allegation that Plaintiffs' facility was "similarly situated" to the County-owned solid waste processing facilities. Comp. ¶ 113(d). Plaintiffs claim that the County discriminated against them by expending hundreds of millions of dollars of public funds on public facilities, while refusing to grant Plaintiffs similar treatment. Count III alleges that the County's actions were a) "intentionally designed to injure Plaintiffs in favor of Defendant's own plants," b) "arbitrarily" determined, and c) "not rationally related to a legitimate government interest." Comp. ¶ 114-115.

The County contends that Section 403.7063 neither contains an express waiver of sovereign immunity nor creates a cause of action. The Court finds, however, that such a holding would result in the existence of a right without a remedy and that the statute therefore impliedly both waives sovereign immunity and creates a cause of action. The Court nevertheless finds that summary judgment should be granted as to this count because it entails relitigation of the propriety of the zoning revocation itself. Plaintiffs, in their zoning appeal, raised the same substantive issues asserted in Count III (discrimination against private versus public waste facilities) as grounds for reversal. Although Plaintiffs did not cite Section 403.7063 in their argument, they could have done so.

With regard to the allegations of an arbitrary zoning revocation not rationally related to a legitimate government interest, the Circuit Court, in affirming the revocation, found a legitimate, rational public purpose both necessarily and expressly. *See, e.g., Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1379 ("[E]xercise of the state's police power must

relate to the health, safety, and welfare of the public and may not be arbitrarily and capriciously applied."). As recognized by the federal courts, on appeal from a zoning action Florida courts affirm zoning actions only when "the administrative action is *not* arbitrary or *discriminatory* . . . . Florida does not call for its courts to rubber stamp administrative zoning actions, but rather carefully to consider their validity or invalidity." *Lake Lucerne Civic Ass'n, Inc. v. Dolphin Stadium Corp.*, 878 F.2d 1360, 1369 (1989) (emphasis supplied); *see also Metropolitan Dade County v. Brisker*, 485 So. 2d 1349, 1351 (Fla. 3d DCA 1986), *rev. den.*, 494 So. 2d 1151 (Fla. 1986). Additionally, the Circuit Court recognized a proper public purpose in holding that the County Commission was faced with the choice of "deciding between the comfort, perhaps health, of 800 school children and the need to environmentally recycle difficult-to-dispose-of garbage into healthful crop fertilizer." Cir. Ct. Op. at 2. The Motion for Summary Judgment is therefore granted as to Count III.

Count IV (Federal Inverse Condemnation Claim Incorporating Florida Inverse Condemnation Claim)

Count IV, a Fifth Amendment federal inverse condemnation claim, incorporates and reasserts the Florida inverse condemnation claim. Summary judgment is granted as to Count IV on the same grounds that summary judgment is granted as to Count I.[7]

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[7] Count IV asserts that a federal inverse condemnation claim "*is brought* under 42 U.S.C. § 1983 and the Fifth Amendment of the

It is therefore ORDERED and ADJUDGED as follows:

1. The Motion for Summary Judgment is GRANTED as to Counts I, II, III and IV.[8]

2. The County's Motions to Dismiss and to Strike are DENIED as moot.

DONE AND ORDERED in Chambers, at Miami-Dade County, Florida, on this 22nd day of June, 2001.

s/Gerald D. Hubbart
CIRCUIT COURT JUDGE

Copies furnished to:

Joseph W. Beasley, Esquire

United States Constitution." ¶ 120 (emphasis supplied). At the same time, Plaintiffs seek to assert a right to reserve that federal claim for subsequent prosecution "in a federal forum if necessary." ¶ 119. Plaintiffs allege, as they must to secure such a reservation, that they are in State court "*involuntarily*, following the decision of the federal court . . . ." The Court notes, however, that Plaintiffs filed the present Complaint before appealing the U.S. District Court decision, filed a cross-appeal only in response to the County's appeal, and voluntarily withdrew their cross-appeal. Nevertheless, the Court need not and does not reach any non-Florida claim lying exclusively within the jurisdiction of the federal courts which could survive the present litigation. Whether any further viable federal claim might survive this order is for the determination of any federal court before which Plaintiffs may seek to argue that they have effected a valid reservation of a right to sue in federal court.

[8] *See* n._Ref515962550\h7, *supra* at 15

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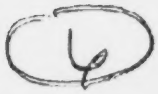
122



FILED
MAR 3 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-567

IN THE
Supreme Court of the United States

AGRIPOST, LLC, a Florida Limited Liability Company (Successor by Merger to Agripost, Inc.) and AGRI-DADE, LTD., a Florida Limited Partnership, *Petitioners*,

v.

MIAMI-DADE COUNTY, FLORIDA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

INTRODUCTION 1

I. JUDICIAL DECISIONS — INCLUDING SPECIFICALLY THOSE FROM THIS COURT — ARE IN CONFLICT ABOUT WHAT JUDICIAL SYSTEM A PROPERTY OWNER MUST (OR EVEN MAY) USE TO PURSUE 5TH AMENDMENT TAKINGS CLAIMS. 4

II. THE 11TH CIRCUIT'S *FIELDS* RULE, IMPLEMENTING *WILLIAMSON COUNTY* BY REQUIRING STATE COURT LITIGATION OF STATE ISSUES BUT PROMISING EVENTUAL FEDERAL COURT LITIGATION, SHOULD ALLOW THIS CASE TO PROCEED FREE OF *WILLIAMSON COUNTY*..... 10

CONCLUSION..... 14

TABLE OF AUTHORITIES

Page

Cases

Bell v. Hood,
327 U.S. 678 (1946) 3

Burnett v. Grattan,
468 U.S. 42 (1984) 1

City of Chicago v. International College of Surgeons,
522 U.S. 156 (1997) ..... passim

Del-Prairie Stock Farm, Inc. v. County of Walworth,
572 F.Supp.2d 1031 (E.D. Wis. 2008) 5, 6, 7, 9

England v. Louisiana Medical Examiners,
375 U.S. 411 (1963) 12

Felder v. Casey,
487 U.S. 131 (1988) 1

Harper v. Virginia Dept. of Taxation,
509 U.S. 86 (1993) 12

Kottschade v. City of Rochester,
319 F.3d 1038 (8th Cir.), *cert. den.*,
No. 02-1848 (2002) 9

Mitchum v. Foster,
407 U.S. 225 (1972) 1

Monroe v. Pape,
365 U.S. 167 (1961) 2

Patsy v. Florida Board of Regents,
457 U.S. 496 (1982) 2

Reahard v. Lee County,
30 F.3d 1412 (11th Cir. 1994) 6

TABLE OF AUTHORITIES
(continued)

Page

San Remo Hotel v. City & County of San Francisco, 545 U.S. 323 (2005) ..... passim

Sandy Creek Investors, Ltd. v. City of Jonestown, 325 F.3d 623 (5th Cir. 2003) 6

Williamson County Reg. Plan. Agency v. Hamilton Bank, 473 U.S. 172 (1985) ..... passim

Constitution

Fifth Amendment 1, 2, 9, 12

Statutes And Rules

28 U.S.C. § 1441(a) 7

42 U.S.C. § 1983 ..... 1, 12

Other Authorities

Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts*, 26 Ecology L.Q. 1, 19 (1999) 8

Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 71 (1995) 5

INTRODUCTION

Instead of addressing the serious legal issues presented by this case, Respondent's Brief in Opposition tries to overwhelm the Court with a fogbank of factual minutiae that sound more like a jury argument than an appellate brief. Petitioner Agripost has sought only one thing during fifteen years of litigation: a federal trial of its federal constitutional claims, the same as other constitutionally aggrieved plaintiffs. That is why it initially filed its 5th Amendment claims in U.S. District Court. The way it was thereafter shuttled between state and federal courts demonstrates the urgent need for rectification of this procedural morass.

This is a 42 U.S.C. § 1983 case, although you couldn't tell it from Miami-Dade's brief. The Court has been clear about the scope of that statute: It provides a ***federal*** remedy in ***federal*** court to protect citizens against unconstitutional local government actions impairing their ***federal*** rights. (E.g., *Mitchum v. Foster*, 407 U.S. 225, 239 [1972]; *Burnett v. Grattan*, 468 U.S. 42, 50, 55 [1984]; *Felder v. Casey*, 487 U.S. 131, 141 [1988].) To accomplish that, Congress "thr[e]w open the doors of the United States courts" to those deprived of constitutional rights "to provide these individuals ***immediate access to the***

federal courts . . . " (*Patsy v. Florida Board of Regents*, 457 U.S. 496, 504 [1982]; emphasis added.)

The contrary rule applied below to keep Agripost from the federal courts was created in *Williamson County Reg. Plan. Agency v. Hamilton Bank*, 473 U.S. 172 (1985). That rule — applied only in 5th Amendment property takings cases — requires prior trial in state court in order to "ripen" the federal issues for federal court litigation, and is thus contrary to all of the cases cited above. (Compare *Monroe v. Pape*, 365 U.S. 167, 183 [1961] ["It is no answer that the state has a law which if enforced would give relief."].)

Williamson County also, as recognized recently by four Justices (*San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323, 351 [2005] [Rehnquist, C.J., concurring on behalf of himself and Justices O'Connor, Kennedy, and Thomas]) is not doctrinally true to the 5th Amendment. Review here is mandated in order to settle the core constitutional issue of a 5th Amendment plaintiff's right to choose trial of a federally protected right in a federal forum.

Miami-Dade's discussion of what "facts" were or were not litigated or decided in various state court proceedings is eyewash. (See *post*,

pp. 10-12.) The simple fact is this: If the erroneous rule of *Williamson County* had not been in existence, then the case initially filed by Agripost in U.S. District Court would have proceeded to decision there, instead of consuming a king's ransom in judicial and private resources in a fruitless back-and-forth shuttle between the two court systems. That is why it is critical to review the jurisprudential underpinnings of *Williamson County* as urged in the *San Remo* concurring opinion. Contrary to Miami-Dade's assertions, Agripost has never sought a "second bite" (Br. in Opp., p. 18) nor a rule *requiring* all takings claims to be brought in federal court (Br. in Opp., p. 34). It simply asked that it be allowed to choose its forum, like any other plaintiff where there is concurrent jurisdiction. (Compare, e.g., *Bell v. Hood*, 327 U.S. 678, 681 [1946].)

The problem is exacerbated in this case by the 11th Circuit's settled procedure on how to reconcile *Williamson County*'s insistence on ripening regulatory taking cases via state court litigation with the general obligation of federal courts to adjudicate cases within their jurisdiction. The 11th Circuit told property owners like Agripost to go to state court, reserve their federal issues for later trial in federal court and then return to federal court if necessary. (See Pet. App., p. 10 [collecting 11th Circuit cases].) Following the 11th Circuit's

command — which promised an eventual U.S. District Court trial — led to the series of state and federal appearances Roman numeralized by Miami-Dade up to *Agripost X*. (Presumably, this Petition represents *Agripost XI*.) That needless glut of opinions proves the point: This case should have proceeded in U.S. District Court when initially filed. It is time to discard the *Williamson County* rule that is capable of producing such anomalous, if not bizarre, results.

I.

JUDICIAL DECISIONS — INCLUDING SPECIFICALLY THOSE FROM THIS COURT — ARE IN CONFLICT ABOUT WHAT JUDICIAL SYSTEM A PROPERTY OWNER MUST (OR EVEN MAY) USE TO PURSUE 5TH AMENDMENT TAKINGS CLAIMS.

If the author of Miami-Dade's Brief in Opposition truly believes that the Court's decisions in *Williamson County*, *San Remo Hotel*, and *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997) present "neither conflict nor confusion" (Br. in Opp., p. 27) then he is one of a miniscule minority. Even commentators who believe that regulatory taking cases should be tried in state courts acknowledge the internal inconsistency

in this jurisprudence. (E.g., Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 71 ["misleading"; "a fraud and a hoax on landowners"] [1995].)

A recent illustration of the problems caused for lower courts and litigants appears in the opinion of an obviously frustrated trial court in *Del-Prairie Stock Farm, Inc. v. County of Walworth*, 572 F.Supp.2d 1031 (E.D. Wis. 2008). The procedural posture clearly shows the confused nature of the law. Suit was filed in state court, thus complying with *Williamson County*. The defendant then removed the case to federal court, as allowed by *City of Chicago*. That's when things really got strange. Having removed the case to federal court by claiming federal jurisdiction, the defendant then sought to have it dismissed on the ground that the federal court *lacked* jurisdiction because the case was not ripe for federal litigation under *Williamson County* because it had not been tried in state court — the very court from which the defendant had removed the case, thereby preventing its adjudication. That the law countenances such a farcical series of maneuvers should be an embarrassment to the

system. It surely highlights a problem that cries out for reasoned resolution.[1]

In its analysis, the *Del-Prairie* court concluded that *Williamson County* created a "true 'Catch 22' conundrum" for property owners because of its holding that regulatory taking cases must be ripened by trial in state court. The upshot of that is that once ripened, such a case (as shown below) is subject to arguments of claim or issue preclusion. (572 F.Supp.2d at 1033; quoting with approval.) The opinion also notes that "*Williamson County* and *City of Chicago* are in direct conflict." (*Id.*; quoting with approval.)

In sum, *Del Prairie* concludes:

> ". . . the *Williamson County* Court appears to have mischaracterized the state litigation requirement as a ripeness rule when, in actuality, it strips federal courts of jurisdiction over federal takings claims." (*Id.*)

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[1] *Del-Prairie* is not the only case in which governmental defendants have sought to twist *Williamson County* and removal jurisdiction in this bizarre fashion. (See e.g., *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 626 [5th Cir. 2003]; *Reahard v. Lee County*, 30 F.3d 1412, 1414, 1418 [11th Cir. 1994].)

Miami-Dade supports its argument with an assertion that "*Williamson County* was properly decided." (Br. in Opp., p. 28.) That section of the brief, however, merely reasserts the conclusions from *Williamson County*, ignores completely the overwhelming judgment of legal commentators, as well as the analysis of *Williamson County* in the Petition (see Pet., pp. 8-22), and ignores the critique in the four-Justice concurring opinion in *San Remo* which called attention to some of *Williamson County*'s doctrinal flaws and urged review by the Court when a direct challenge was made to *Williamson County* (a challenge missing from *San Remo*). Contrary to Miami-Dade's assertion (Br. in Opp., p. 28) arguments about the underlying validity of *Williamson County* were not even discussed, let alone decided, in *San Remo*. That issue had not been raised by either of the parties, but only by amici, and was not dealt with by the Court. Miami-Dade's discussion of *Williamson County* has already been responded to in the Petition.

Miami-Dade's discussion of *City of Chicago* (Br. in Opp., pp. 30-32) fails to deal with the nub of that case which, as *Del-Prairie* noted, is "in direct conflict" with *Williamson County*. The Court allowed removal in *City of Chicago* on the erroneous assumption that the property owner could have brought the case initially in federal court. (28 U.S.C. § 1441[a].) Plainly, it

could not. Nor, contrary to Miami-Dade's argument (Br. in Opp., p. 30-31), was the removal related solely to other federal claims in the state court complaint there. First, ripeness is determined by the complaint's allegations which, there as here, included a takings claim. (*City of Chicago*, 522 U.S. at 160.) Second, the same ripeness rules have been applied to due process and equal protection claims. (See Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts*, 26 Ecology L.Q. 1, 19 [1999] [collecting exemplars].)

San Remo all but acknowledged the need for a thoroughgoing *Williamson County* review. At oral argument, Justice O'Connor directly asked counsel for the property owner whether he had challenged *Williamson County*. When he said he had not, she responded "Maybe you should have." (Tr. [May 28, 2005].) What that comment foretold was the four-Justice concurring opinion that was eventually filed.[2]

The late Chief Justice's concurring opinion noted that "*Williamson County*'s state-litigation

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[2] The reason that Agripost's former counsel believed that "*San Remo* . . . is certain to have a significant impact on the instant case" (see Br. in Opp., pp. 10, 32) is that he (like most observers) believed that the Court would deal with the validity of *Williamson County*. As the Court knows, it did not.

rule has created some real anomalies . . . all but guarantee[ing] that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee." (*San Remo*, 545 U.S. at 351.) Acknowledging that other litigants are not subjected to such a rule, the concurring opinion questioned "why federal takings claims in particular should be singled out to be confined to state court . . . ." (*Id.*) The opinion concludes that "the justifications for [*Williamson County*'s] state litigation requirement are suspect, while its impact on takings plaintiffs is dramatic" and urges the Court to "reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts." (*Id.* at 352.)

Unlike the *San Remo* petitioners, Agripost has directly challenged *Williamson County* here. Miami-Dade's argument that Agripost waived the argument by not asking the lower courts to overrule *Williamson County* (Br. in Opp., p. 33) simply misunderstands the hierarchical nature of the system. *Williamson County* was a decision of this Court. No lower court had the jurisdiction to overrule it. (See *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 [8th Cir.], *cert. den.*, No. 02-1848 [2002] [continuing validity of *Williamson County* "is for the Supreme Court to say, not us."]; *Del-*

Prairie, 572 F.Supp.2d at 1034 [responding to commentators' suggestion that *Williamson County*'s state court litigation requirement be set aside: "As a district court judge, however, I am not authorized to do this."].)

It is time. As shown in the Petition, the scholarly community has harshly criticized *Williamson County*'s ripeness test, lower courts found the rule so unsatisfying that they sought ways around it, and the rule has clearly operated as a trap for property owners with takings claims. This is simply unworthy of any aspect of constitutional jurisprudence.

II.

THE 11TH CIRCUIT'S *FIELDS* RULE, IMPLEMENTING *WILLIAMSON COUNTY* BY REQUIRING STATE COURT LITIGATION OF STATE ISSUES BUT PROMISING EVENTUAL FEDERAL COURT LITIGATION, SHOULD ALLOW THIS CASE TO PROCEED FREE OF *WILLIAMSON COUNTY*.

Miami-Dade's lengthy presentation seeks to take advantage of "facts" supposedly "found" in earlier proceedings in state forums, although done without full trial and without discovery. That presentation has been strongly contradicted (R25-78; 25-813-881; R35-10-11)

and should not distract from the central legal issue here. A full trial, after complete discovery, would present a jury with a very different picture.[3]

Miami-Dade's ploy ignores both the error and unfairness in *Williamson County*, and the impact of the 11th Circuit's carefully conceived procedure for handling *Williamson County* cases. (See Pet. App., p. 10, describing this as the "settled law in this Circuit." The procedure was to have the federal case "ripened" in state court (which, after all, is all that *Williamson County* said it was doing [e.g., 473 U.S. at 185 ["claim is premature"]; *Id.* at 186 ["claim is not ripe"]; *Id.* at 194 ["not yet ripe"]; *Id.* at 197 ["claim is premature"].) During that ripening process, the landowner would file written notice

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[3] The "facts" were largely determined in the state administrative review proceedings, which were determined on a cold record, without testimony and without discovery. Those initial "factual" determinations then formed the basis for all subsequent judicial decisions. (See, e.g., Pet. App. p. 15, n. 7, showing that a purportedly "de novo" ruling was based on the administrative conclusion that Agripost had already been "determined to have violated" its permit. No trial in any of the subsequent proceedings ever looked beyond that initial administrative conclusion. That prevented any fair litigation of Agripost's taking claim.

with the state court that the federal claims were reserved for federal court litigation. (Which Agripost did here. [Pet. App., p. 66 — Florida Court of Appeal acknowledged the reservation had been made].)[4] If satisfactory relief did not result, then the landowner could return to federal court. The importance of a full federal trial of factual issues has been underscored by the Court. (*England v. Louisiana Medical Examiners*, 375 U.S. 411, 416-417 [1963] [quoted at Pet., p. 4, n. 1.)

It was only because of the 11th Circuit's system, with its promise of eventual federal trial, that Agripost complied and went to state court (rather than seeking appellate relief). Compliance with that Circuit determination should not undermine Agripost's position here.

Thus, if the Court determines in this case that *Williamson County* needs to be overruled so that property owners with 5th Amendment claims can be treated the same as other civil rights plaintiffs under 42 U.S.C. § 1983, such a new rule needs to be applied to wipe Agripost's slate clean. As the Court explained in *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 96, 97-98 (1993), a new rule of constitutional

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[4] Thus, notwithstanding what may have been inartful expression by counsel (Br. in Opp., pp. 8-9), the state courts understood the reservation. (See also R25-37.)

interpretation adopted by the Court "must be given full retroactive effect by all courts adjudicating federal law. . . . [and] its rule should apply retroactively to the litigants then before the Court."

At the same time that overruling of *Williamson County* merits full retroactivity, the same cannot be said of *San Remo* in light of the 11th Circuit's settled procedure. When *San Remo* applied the full faith and credit statute to a 9th Circuit case, it established no new law for that Circuit, as the 9th Circuit had already shown that it would apply claim preclusion in takings cases already tried in state courts. (*Dodd v. Hood River County*, 136 F.3d 1219 [9th Cir. 1998].) Here, however, *San Remo* ***does*** present new law for the 11th Circuit. As the court below acknowledged, it had repeatedly held that return to federal court for trial on the merits could legally be reserved. (Pet. App., p. 10.) The decision in *Harper* thus argues against applying *San Remo* to Agripost.

Agripost is a litigational victim of a system deliberately constructed by the 11th Circuit to deal with applications of this Court's *Williamson County* decision. These things seem clear: (1) *Williamson County* needs to be reviewed and (as to its state court litigation prong) disapproved; (2) because Agripost was following the direct orders of the 11th Circuit in

submitting to state court jurisdiction — but without submitting its federal claims there — it should not suffer the loss of the federal forum it legitimately chose to litigate its federal claims.

CONCLUSION

The Brief in Opposition demonstrates the central point of the Petition: the decision in *Williamson County* created a system that puts parties and courts to needless litigation. *San Remo* could not resolve the issue because the validity of *Williamson County* was not put in play by the parties. Its continuing vitality would have to await another day. That day is here.

To resolve the *Williamson County* conundrum once and for all, and to devise a fair resolution to the 11th Circuit's manner of dealing with *Williamson County*, Agripost prays that certiorari be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 2 8 2008
OFFICE OF THE CLERK

No. 08-567

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iii
STATEMENT OF AMICUS CURIAE INTEREST	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE JUSTIFICATION FOR THE STATE LITIGATION RIPENESS REQUIREMENT HAS OUTLIVED ITS PURPOSE AND SERVES ONLY TO EXTINGUISH RATHER THAN RIPEN A TAKINGS CLAIM	5
A. The Requirement To Pursue State Compensation Remedies Before Filing A Federal Takings Claim Under § 1983 Conflicts With The Court's Holding In *Monroe* That Congress Intended § 1983 To Supplement State Remedies	7
B. The Court's Decision in *First English* Renders It Impossible To Ripen A Federal Takings Claim Under *Williamson* Because The Interplay of The Decisions Extinguish Any Basis For Federal *Jurisdiction*	11

Contents

Page

II. *WILLIAMSON'S* STATE LITIGATION REQUIREMENT WHICH IS NO LONGER JUSTIFIED BY ANY RIPENESS CONCERN IS CONTRARY TO LEGISLATIVE ENACTMENTS MEANT TO AUTHORIZE FEDERAL *DISTRICT COURT JURISDICTION IN TAKINGS CASES* 14

A. The Lower Federal Courts Had Exercised Jurisdiction Over State Action Takings Claims For Approximately 90 Years Before *Williamson* Curtailed That Jurisdiction 16

B. The Court Had Never Before *Williamson* Applied Any Blanket Rules Against Exercising Jurisdiction Over Takings Claims 19

III. *WILLIAMSON* HAS PREVENTED THE EFFICIENT DEVELOPMENT OF FEDERAL TAKINGS LAW 21

CONCLUSION 23

TABLE OF CITED AUTHORITIES

Page

Cases

Agins v. Tiburon, 447 U.S. 255 (1980) 5, 6

Barron v. Baltimore, 32 U.S. 243 (1833) 19

Chicago B. & Q. R. Co. v. City of Chicago, 166 U.S. 226 (1897) 16

City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) 12

County of Alleghany v. Frank Mashuda Co., 360 U.S. 185 (1959) 19

Cuyahoga River Power Co. v. City of Akron, 240 U.S. 462 (1916) 16-17, 18

Daniels v. Williams, 474 U.S. 327 (1986) 8

Dews v. Sunnydale, 109 F. Supp 2d 526 (ND Tx. 2000) 15

Fair Assessment In Real Estate Assoc., Inc. v. McNary, 454 U.S. 100 (1981) 15, 16

First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304 (1987) ..... *passim*

Gordon v. City of Warren, 579 F. 2d 386 (6th Cir. 1978) 18

Cited Authorities

Page

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 9

Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978) 2, 18, 23

Monroe v. Pape. 365 U.S. 167 (1961), *overruled, in part, Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978) ..... *passim*

Mosher v. Phoenix, 287 U.S. 29 (1932) 17

Parratt v. Taylor, 451 U.S. 527 (1981), *overruled, in part, Daniels v. Williams*, 474 U.S. 327 (1986) 8, 10, 20

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) 10

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 12, 20

San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981) 5

San Remo Hotel L.P. v. San Francisco, 545 U.S. 323 (2005) 14, 15, 21, 22

Seiler v. Northville Township, 53 F. Supp. 2d 957 (E.D. Mich. 1999) 20, 21

Cited Authorities

Page

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) 9

United States v. Clarke, 445 U.S. 253 (1980) .. 12, 13

Wilkinson v. Pitkin County, 142 F. 3d 1319 (10th Cir. 1998) 20

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) ..... *passim*

Zwickler v. Koota, 389 U.S. 241 (1967) 14

United States Constitution

5th Amendment 7, 11, 16, 19

14th Amendment ..... *passim*

Statutes

28 U.S.C. § 1331 4

Tax Injunction Act, 28 U.S.C. § 1341 ..... 15, 16

28 U.S.C. § 1343(3) 4

Civil Rights Act, 42 U.S.C. § 1983 ..... *passim*

STATEMENT OF AMICUS CURIAE INTEREST[1]

The Real Property Law Section of the State Bar of Michigan provides education and information about current real property issues through meetings, seminars, its website, pro bono service programs, and quarterly publication of a journal. Membership in the Section is open to all members of the State Bar of Michigan. Statements made on behalf of the Section do not necessarily reflect the views of the State Bar of Michigan.

The Michigan Supreme Court has often invited the Section to submit amicus briefs in cases concerning real property issues. The Section has submitted amicus briefs in several important Michigan land use cases including *Schwartz v. City of Flint*, 426 Mich 295 (1986) (remedies available in zoning cases) *Paragon v. City of Novi*, 452 Mich 568 (1996) (ripeness of constitutional claims in zoning cases) and most recently in *Houdini v. City of Romulus*, 480 Mich 1022 (2008) (preclusive effect of a prior Zoning Board of Appeals decision in a subsequently filed action containing constitutional taking claims).

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution intended to fund its preparation or submission. The Petitioners have filed a blanket consent and the Respondent's consent to the filing of this brief is being lodged herewith. The parties have been given at least 10 days notice of amici's intention to file.

The Section is submitting this brief based on its strong commitment to education of real property issues and interest in the development of an extremely important area of the law to Michigan property owners. The Section believes that its expertise in state and federal land use law can assist the Court in its review of the Petition for Certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1978 this Court held in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978) that the drafters of the 14th Amendment and its implementing legislation intended, in relevant part, that property owners would use 42 U.S.C. § 1983 to assert takings claims against state actors in federal court. *Id.* at 687. Between 1980 and 1987, the Court reviewed four cases that posed the question whether the 5th Amendment as applied to the states through the 14th Amendment requires that a state recognize a compensation remedy for the temporary regulatory taking of property. The Court eventually reached the issue in *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304 (1987) holding that the Federal Constitution requires such a remedy. *Id.* at 318-319. During the seven year interval that the Court considered the compensation question, the Court also established requirements to ripen compensation claims. In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), the Court held that a federal takings claim could not ripen unless the property owner first attempted to recover compensation for the taking using state judicial proceedings.

Williamson further held that the takings claim would be ripe once the owner established that the state did not provide any, or an adequate, compensation remedy. *Id.* at 196. The Court did not distinguish nor even mention its holding in *Monroe v. Pape*, 365 U.S. 167 (1961), *rev'd, in part, on other grounds, Monell*, 436 U.S. at 690 that Congress intended for § 1983 to provide a remedy supplemental to otherwise adequate state remedies that the citizen did not have to seek and the state refuse before the citizen could bring a § 1983 action in federal court. 356 U.S at 183. *Williamson* holds directly adverse to *Monroe* that a takings claimant must first seek the state remedy and not file a § 1983 action unless the state refuses to provide it. 473 U.S. at 195.

The "state litigation" requirement has outlived its original purpose to avoid the premature adjudication of constitutional questions because the Court reached the constitutional question in *First English* that the *Williamson* Court had found premature because the Bank had not utilized state procedures to obtain just compensation. Consequently, the state litigation requirement no longer serves any purpose as a ripening agent because the 14th Amendment requires state courts to provide a compensation remedy for temporary regulatory takings. For that same reason *Williamson* precludes a citizen from pleading a ripe federal takings claim as a matter of law, unless in the remote chance, the state court defies *First English* or the remedy is somehow inadequate.

The *Williamson* Court may not have anticipated the evolution of the state litigation requirement into a judicially created exception to federal court adjudication

of claims asserted under § 1983. The Court, therefore, did not examine whether it had the judicial power to bar federal court jurisdiction over cases, which in *Monell* the Court had held that Congress intended would be litigated in a §1983 action in federal court.

Twenty years have passed since *Williamson* and during that time the lower federal courts' role in § 1983 takings actions has been reduced to routinely dismissing such claims, as either unripe if the owner has not pursued state litigation, or barred under preclusion doctrines if the owner has pursued state litigation. The lower federal courts essentially have been excluded from making substantive decisions in regulatory takings cases, which has impeded a cohesive development of federal takings law.

The Court should examine for the sake of the many citizens denied a federal forum contrary to congressional intent whether the Court's original reasons for imposing the state litigation requirement remain a doctrinally sound justification for the elimination of federal court adjudication of those claims. Upon such examination, the Court should find that neither the text nor history of the 14th Amendment; the legislation implementing compensation remedies under the 14th Amendment; the Court's precedents regarding the purpose of the amendment and legislation; the legislation creating federal question jurisdiction under 28 U.S.C. § 1331 or jurisdiction over civil rights claims under 28 U.S.C. § 1343(3); and the history of litigating takings claims against state actors in federal court, provide any doctrinal basis or judicial authority for the practical

elimination of federal district court jurisdiction to hear takings claims either under § 1983 or in cases otherwise arising under federal law.

The Court, therefore, should either limit or overrule *Williamson,* because the state litigation ripeness requirement that originated in the case has outlived its purpose of avoiding premature adjudication of federal taking claims and instead has deprived citizens of rights that Congress intended to confer to enforce the provisions of the 14th Amendment to the United States Constitution.

ARGUMENT

I.

THE JUSTIFICATION FOR THE STATE LITIGATION RIPENESS REQUIREMENT HAS OUTLIVED ITS PURPOSE AND SERVES ONLY TO EXTINGUISH RATHER THAN RIPEN A TAKINGS CLAIM

The question presented in *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985), which the Court had been unable to answer previously in *Agins v. Tiburon,* 447 U.S. 255 (1980) and *San Diego Gas & Electric Co. v. San Diego,* 450 U.S. 621 (1981) was "whether Federal, State, and Local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations." *Id.* at 185. In *Agins, supra,* the California Supreme Court had held that landowners could not sue

the government in inverse condemnation as a remedy for the application of a confiscatory zoning ordinance, but could only seek relief through mandamus or a declaratory judgment action invalidating the ordinance. *Agins*, 447 U.S. at 259. In *Williamson*, the Respondent Bank had tried a taking claim under § 1983 in federal district court and the jury awarded it compensation for a taking. The 6th Circuit upheld the jury's verdict and rejected the argument that no damage remedy should exist for regulatory takings. The Petitioner County asked this Court to rule, as had the California Supreme Court, that even if a regulation has the same effect as an eminent domain taking, the Court should analyze the taking as arising under the Due Process rather than the Just Compensation Clause, and hold that deprivations under the Due Process Clause do not require compensation. 473 U.S. at 185.

The Court never reached the question presented by the Petitioner, but reversed on other grounds because the Bank's takings claim had not been ripe for adjudication, not only because the Bank had failed to get a final determination from the planning agency regarding the number of residential units that it could build, but also because the Bank filed its taking claim without first seeking and being denied compensation through the State of Tennessee's condemnation statute, which included an option to sue in inverse condemnation if the government occupied private property without invoking the statutory procedure. *Id.* at 194, n.13.

A. The Requirement To Pursue State Compensation Remedies Before Filing A Federal Takings Claim Under § 1983 Conflicts With The Court's Holding In *Monroe* That Congress Intended § 1983 To Supplement State Remedies

The Court gave several reasons for the state litigation ripeness requirement. First, it reasoned that because the 5th Amendment does not proscribe the taking of property for a public use, but only proscribes takings without the payment of just compensation, the government does not violate any constitutional right until it has denied the payment of just compensation. "The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a ***§ 1983 action***." *Id.* at 194, n. 13. (Emphasis added). The Court further reasoned that because the Constitution does not require pre-deprivation compensation "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner ***has no claim*** against the Government for a taking." *Id.* at 194-195. (Emphasis added). The Court concluded, therefore, that "if a State has an adequate procedure of seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195. The Court held that because the Bank had not demonstrated the inadequacy or unavailability of the Tennessee eminent domain procedures as a source of compensation, its taking claim was premature until it used that procedure and the state denied compensation. *Id.* at 196 -197.

The Court in significant part justified the state litigation requirement by analogizing to *Parratt v. Taylor*, 451 US 527 (1981), *overruled, in relevant part, Daniels v. Williams*, 474 U.S. 327 (1986). The *Williamson* Court reasoned by analogy to *Parratt* that because the 5th Amendment does not require pre-deprivation compensation "and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not 'complete' until the State fails to provide adequate compensation for the taking." 473 U.S. at 195. In *Daniels*, *supra*, the Court reversed *Parratt* to the extent that it suggested that the mere lack of due care by state officials could state a violation of the due process clause. 474 U.S. 330–331. The *Daniels* Court expressed the concern that according due process protection for the random and unauthorized acts of prison officials served only to trivialize the intent of the due process clause. 474 U.S. at 330. Moreover, the Court held that it had traditionally applied the due process clause to "deliberate decisions of government officials to deprive a person of life, liberty or property." *Id.* at 331.

Parratt did not provide a sound analogy because land use litigation concerns the deliberate decisions of government officials who use regulation as a shortcut around paying compensation for imposing burdens on some landowners for the public's benefit. No relevant comparison exists between the deliberate regulatory

regime that for example prevented Mr. and Mrs. Suitum from building their retirement home in the Tahoe preservation area and Mrs. Suitum's later struggle for compensation, with a prisoner's loss of a hobby kit due to the negligent and random acts of prison personnel. *See generally, Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). This is not to disparage prisoner rights, but to highlight the unwarranted trivialization of land use cases especially in light of this Court's long tradition of recognizing the historically important values incident to the protection of the type of property interests usually at stake in land use cases. *See e.g., Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972) ("Property does not have rights. People have rights. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. . . . That rights in property are basic civil rights has long been recognized.") *Id.* at 552.

Moreover, *Williamson* neglected to explicitly distinguish its earlier holding in *Monroe, supra,* that citizens did not need to seek and be denied state remedies before filing a §1983 action. *Monroe* held, "[i]t is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, *and the latter need not be first sought and refused before the federal one is invoked.* Hence the fact that Illinois by its Constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court." 365 U.S. at 183. (Emphasis added) The Court also made no effort to harmonize the two internally inconsistent prongs of its ripeness holding, which required no exhaustion of state judicial remedies to satisfy the "final decision rule,"

but did require such exhaustion to satisfy the second prong of the ripeness rule. The Court reasoned that the "final decision" rule, which required no pursuit of state judicial remedies or administrative review before filing a takings claim, was consistent with *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), which held consistent with *Monroe* that a litigant did not need to exhaust state administrative remedies before invoking § 1983. The Court, however, then required exhaustion of state judicial remedies under the second prong of the test without explaining how that holding was consistent with *Patsy* and the final decision rule.

The Court's analogy to *Parratt* would be more defensible if the Court had held that if the government takes private property without instituting eminent domain procedures, the availability of a post-taking inverse condemnation procedure vitiates the *due process* violation, but not the takings clause violation. The Court's holding that there is no federal constitutional violation as long as the state recognizes a just compensation remedy as discussed immediately below has in effect eliminated federal regulatory takings claims.

B. The Court's Decision in *First English* Renders It Impossible To Ripen A Federal Takings Claim Under *Williamson* Because The Interplay of The Decisions Extinguish Any Basis For Federal *Jurisdiction*

Oddly enough, it is this Court's decision in *First English, supra*, that makes it virtually impossible to ripen a federal takings claim under *Williamson*. In *First English*, this Court answered the questions that were not ripe for review in *Williamson* and held that (1) regulatory taking claims arose under the Just Compensation clause, which provides a self-executing compensation remedy, and not the Due Process Clause; and (2) the 5th Amendment as applied to the states though the 14th Amendment prohibits a state from denying a landowner just compensation for the temporary regulatory taking of land. 482 U.S. at 316-320. The *First English* plaintiff presented a ripe claim under *Williamson* because it had filed an inverse condemnation claim in a state court, which had dismissed the claim as failing to state a cause of action under California law. *See Id.* at 312 n. 6.

It is reasonable to assume that after *First English* most if not all states began recognizing compensation remedies for temporary regulatory takings. Consequently, in cases filed post *First English*, there is no longer any federal takings claim that can be ripened because as long as the state recognizes a compensation remedy, which it *must*, *Williamson* holds that the landowner has no federal cause of action for a taking as a matter of law. *See* 473 U.S. at 194-195. It is not clear however that even if a state compensation remedy exists

that under *Monroe* a citizen should still be barred from asserting the federal right to compensation in a supplementary federal action.

It is also not clear that even if a state recognizes a just compensation remedy that a landowner cannot allege a constitutional violation when the government deliberately uses its regulatory power to get public benefits at the expense of a single landowner and then refuses to remove the regulation or pay compensation and denies any liability. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 717 (1999). ("When the government repudiates [the duty to pay just compensation] either by denying just compensation in fact or refusing to provide procedures through which compensation may be sought, it violates the Constitution."). In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court characterized a regulatory taking as an attempt to "to improve the public condition . . . by a shorter cut than the constitutional way of paying for the change" *Id.* at 416. The Court further held that the straight and narrow constitutional path required "an exercise of ***eminent domain*** *and* ***compensation***." *Id.* at 413 (Emphasis added)

Moreover, there are "important legal and practical differences between an inverse condemnation suit and a condemnation proceeding." *United States v. Clarke*, 445 U.S. 253, 258 (1980) (Plain meaning of "condemn" in statute did not authorize city to take Indian land without instituting eminent domain procedures). *Accord*, 526 U.S. at 711-712. The existence of an inverse condemnation remedy and the rationale for such actions suggest that an uncompensated regulatory taking, for

which the government denies liability, can violate the constitution, even if the owner can sue the government to establish liability for a taking. The *Clarke* Court observed that an owner's right to file an inverse condemnation action is based on the theory that if the owner has the right to enjoin the government from taking the property without first instituting a formal condemnation action, the owner also has the right to waive the proceeding and instead sue the government to demand compensation. 445 U.S. at 255, n. 2. If it were always true that the taking of private property for a public use does not alone violate the constitution, then the owner would have no right to enjoin a lawful act and seek damages for a lawful act.

In the post *First English* era, therefore, the ripeness issue that led the Court to impose the state court litigation requirement no longer exists and neither does any federal cause of action for a taking under the 14th Amendment as long as the Court continues to hold that there is no federal constitutional violation that can be redressed under federal law if a state recognizes a compensation remedy for a temporary regulatory taking.

II. *WILLIAMSON'S* STATE LITIGATION REQUIREMENT WHICH IS NO LONGER JUSTIFIED BY ANY RIPENESS CONCERN IS CONTRARY TO LEGISLATIVE ENACTMENTS MEANT TO AUTHORIZE FEDERAL *DISTRICT COURT JURISDICTION IN TAKINGS CASES*

The real issue now posed by *Williamson* is whether this Court can consistent with precedent and the separation of powers doctrine eliminate federal court jurisdiction over claims that federal courts had entertained for nearly 90 years before *Williamson*.

In *San Remo Hotel L.P. v. San Francisco*, 545 U.S. 323, 345 (2005) (Rehnquist, J., concurring) , this Court remarked, "it is entirely unclear why [the plaintiffs'] preference for a federal forum should matter for constitutional or statutory purposes." 545 U.S. at 344. It matters first because Congress enlarged federal court jurisdiction to protect individual rights against state action by the adoption of the 14th Amendment, the implementing legislation, which includes § 1983, and the federal question jurisdictional statute. *See Zwickler v. Koota*, 389 U.S. 241, 245-250 (1967). Second, the Court observed in *Monroe* that one reason for the passage of § 1983 was

> "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the 14th Amendment might be denied by the state agencies." 365 U.S. at 180.

As those in the trenches can attest, land use controversies can sometimes ignite passion and prejudice equal to the most contentious civil rights battles in other arenas. *See e.g., Dews v. Sunnydale,* 109 F. Supp 2d 526 (ND Tx. 2000) (one acre lot minimum had discriminatory impact based on race) In these highly charged situations, if the owner chooses to seek a judicial remedy, the owner may prefer a federal forum as in *Dews, supra,* rather than appearing before an elected judge who may be vulnerable to political pressures, from which a federal judge is immune.

Second, Justice Rehnquist observed in his *San Remo* concurrence that the Court had not claimed that any "longstanding principle of comity toward state courts in handling federal taking claims existed at the time *Williamson County* was decided or that one has since developed." 545 U.S. at 350. *Fair Assessment In Real Estate Assoc., Inc. v. McNary,* 454 U.S. 100 (1981) in fact, provides more support for finding that *Williamson* erroneously required the exhaustion of state judicial remedies before invoking a § 1983 remedy in federal court than as support for eliminating federal jurisdiction over takings claims. The *Fair Assessment* Court acknowledged that the text of § 1983 contains no requirement to exhaust state remedies before resort to a federal forum. *Id.* at 104. *Fair Assessment* also acknowledges that the Court held in *Monroe, supra,* and a long line of cases that § 1983 "authorize[d] immediate resort to a federal court whenever state actions allegedly infringed constitutional rights." *See Id.* at 105. The Court contrasted the latter line of authority with the competing line of cases predating and applying the Tax Injunction Act, 28 U.S.C. § 1341 to limit federal

jurisdiction in challenges to state tax systems. *Id.* at 101-102. There is no legislation comparable to § 1341 competing with § 1983 in land use cases. The Court had a valid doctrinal basis to find that Congress intended limiting § 1983 in the special tax context. Moreover, there is no line of authority finding that federal courts should not exercise jurisdiction in land use or takings cases. Contrarily, the Court has a long history of finding that the federal district courts have, and normally should exercise, their jurisdiction in taking cases against state actors.

A. The Lower Federal Courts Had Exercised Jurisdiction Over State Action Takings Claims For Approximately 90 Years Before *Williamson* Curtailed That Jurisdiction

The history of federal jurisdiction over state law takings claims began in 1897 when this Court held in *Chicago B. & Q. R. Co v. City of Chicago*, 166 U.S. 226 (1897), that the 14th Amendment incorporated the 5th Amendment's guaranty of just compensation. The Court determined that it had jurisdiction under the 14th Amendment to review the railroad company's challenge to state eminent domain proceedings and legislation. The Court held that the due process clause of the 14th Amendment requires that the state compensate or secure compensation "to the owner of private property taken for public use under [state authority]." *Id.* at 235.

Following *Chicago B. & Q.*, the Court found in two cases that inverse condemnation claims based on the application of city ordinances arose under the district court's federal question jurisdiction. In *Cuyahoga River*

Power Co. v. City of Akron, 240 U.S. 462 (1916), the federal district court dismissed the power company's takings claim for lack of jurisdiction. The company had alleged that the city passed an ordinance that would take the company's water power without any intention of instituting condemnation procedures or paying just compensation although the ordinance directed the city's attorney to file a condemnation proceeding. The district court found that it had no jurisdiction because it had concluded that if the company had any rights in the water that the city could only take them by paying for them under state condemnation procedures. *Id.* at 463. This Court unimpressed with the possible availability of a state compensation remedy for the alleged taking, reversed finding that the district court did not carefully read the company's complaint in which it had alleged that the city planned to take its water rights without instituting eminent proceedings and without the payment of just compensation. *Id.* at 463-464. The Court directed the district court to hear the case concluding,

> "[w]hether the plaintiff has any rights that the city is bound to respect can be decided only by taking jurisdiction of the case; and the same is true of other questions raised. Therefore it will be necessary for the District Court to deal with the merits, and to that end the decree must be reversed."

Id. at 464.

Similarly, in *Mosher v. Phoenix*, 287 U.S. 29 (1932), the district court dismissed and the court of appeals affirmed the dismissal of a taking claim for lack of

jurisdiction. The question was whether the plaintiff's complaint seeking to restrain the city from taking her land for a street improvement that an Arizona court had previously held the city did not have the authority to effect under a state statute contained a substantial federal question. The plaintiff had also alleged that not only was the action unauthorized under state law, but also that the city was attempting to take the property without compensation and without due process or "any process of law" in violation of the 14th Amendment. *Id.* at 31. The Court relying on *Cuyahoga, supra,* held that the plaintiff's allegations that "the city acting under color of state authority was violating the asserted private right secured by the Federal Constitution, presented a substantial federal question, and that it was error for the District Court to refuse jurisdiction." *Id.* at 32.

Before this Court partially overruled *Monroe, supra,* to hold that municipalities were persons who could be sued for damages under § 1983, there was a split of authority, but some federal district courts held that a landowner could sue a municipality to collect just compensation for an alleged uncompensated taking in federal court directly under the 14th Amendment. *See e.g., Gordon v. City of Warren,* 579 F. 2d 386, 390-391 (6th Cir. 1978) (Court held that 6th Circuit recognized a direct action against municipalities for just compensation under the 14th Amendment).

Following *Monnell, supra,* landowners began using § 1983 to claim damages for de facto or regulatory takings in federal court. In *Monell,* this Court found that the legislature likely intended that § 1983 serve as

"the vehicle by which Congress provided redress for takings, since that section provided the only civil remedy for Fourteenth Amendment violations and that Amendment unequivocally prohibited uncompensated takings." 436 U.S. at 687. The Court based its finding in relevant part on statements made by Representative Bingham, who drafted Section 1 of the 14th Amendment, with the specific intent to avoid decisions such as *Barron v. Baltimore*, 32 U.S. 243, 247 (1833), in which this Court held that a citizen had no recourse under the federal constitution against a city that took the citizen's property without just compensation because the 5th Amendment did not apply to state actors.

The federal district courts, therefore, have traditionally exercised jurisdiction in taking cases against state actors and the legislature intended that federal district courts would have jurisdiction over takings claims against municipalities in § 1983 actions.

B. The Court Had Never Before *Williamson* Applied Any Blanket Rules Against Exercising Jurisdiction Over Takings Claims

Moreover, the Court has not devised any abstention rules that apply solely to eminent domain actions *See e.g., County of Alleghany v. Frank Mashuda Co.*, 360 U.S. 185 (1959) (Court rejected a blanket rule to abstain in diversity cases that implicated the state's power of eminent domain finding federal courts had been "adjudicating cases involving issues of state eminent domain law for many years," without it becoming a hazard to federal-state relations.) *Id.* at 192. A greater potential of such hazards exist in a diversity case that

poses no questions of federal law than in cases raising regulatory takings claims, which are a creature of federal law. This Court of course traces the regulatory takings doctrine to *Pennsylvania Coal, supra.*

Despite the long history of federal court jurisdiction in federal taking cases asserted under the 14th Amendment, following *Williamson*, federal district courts began summarily dismissing regulatory taking claims as (1) unripe if the plaintiff had not yet litigated a state inverse condemnation claim; *See e.g., Seiler v. Northville Township*, 53 F. Supp. 2d 957 (E.D. Mich. 1999); or (2) barred from re-litigation under claim or issue preclusion principles if the plaintiff had pursued compensation in a state court inverse condemnation action; *See e.g., Wilkinson v. Pitkin County*, 142 F. 3d 1319, 1324 (10th Cir. 1998). As discussed, post *First English, Williamson* dictates that a landowner cannot state a federal takings claim as a matter of law because the 14th Amendment requires that all the states recognize compensation claims for temporary regulatory takings. Under *Williamson's* analogy to *Parratt*, The recognition of the state remedy extinguishes the federal claim.

Yet, despite the wholesale dismissal of taking claims in federal courts when filed by the landowner, the Petitioner has fully briefed the jurisdictional anomaly posed by *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), a case in which this Court upheld the removal of a land use case to federal court with no mention of *Williamson*, which, as the Petitioner observed, might be explained by the litigants' failure to mention it. This case has had a harsh impact on

Michigan landowners because Michigan municipal attorneys often remove takings cases seeking just compensation to federal court only to then file a motion for summary judgment asking the court to dismiss the plaintiff's federal claims as unripe under *Williamson* for failure to pursue state judicial remedies. *See for example, Seiler*, 53 F. Supp. at 962. In *Seiler*, the plaintiff had filed his complaint in state court in which he had asserted an inverse condemnation claim and also sought relief under § 1983 action. The district court reasoned that the government had the right to remove the case despite the fact that the court further found that any delay arose from the plaintiff filing unripe federal claims in state court rather than from the Township removing claims that the Township believed to be unripe. *Id.*

III. *WILLIAMSON* HAS PREVENTED THE EFFICIENT DEVELOPMENT OF FEDERAL TAKINGS LAW.

Simply because a state recognizes a compensation remedy should not foreclose either a plaintiff, or for that matter, a defendant from getting a federal court adjudication of the antecedent question of whether the regulation even effects a taking under this Court's regulatory taking jurisprudence. Under *Williamson*, the development of federal regulatory takings law has been left to either this Court, the Federal Court of Claims or state courts struggling to apply this Court's precedents. The Court asserted in *San Remo* that it was "hardly a radical notion to recognize that a significant number of plaintiffs will necessarily litigate

their federal takings claims in state court ." 545 U.S. at 346-347. The Court reasoned that there is little case precedent from federal district courts in takings cases because of the application of the "final decision" rule before *Williamson. Id.* First, if the Court had not added the state litigation requirement in *Williamson*, a plaintiff could have ripened a case dismissed as unripe for lack of a final decision without facing preclusion issues. The state litigation requirement that began with *Williamson*, is the "but for" cause of the lack of precedents from federal district courts. Moreover, the fact that most of the cases in the Court's taking jurisprudence came to the Court on writs of certiorari from state courts has no statistical significance without knowing the number of petitions the Court received from federal and state petitioners in the relevant period. It could be that the Court mostly chooses state cases over federal cases. Moreover, for the last 20 years, *Williamson* has relegated most land use plaintiffs to state court so it is logical that most of the cases would come from state court.

The "radical notion" is the doctrinally suspect elimination of federal district court jurisdiction to hear and try the substantive issues in takings cases and the inefficiency that the lack of jurisdiction has caused in the development of a cohesive body of federal takings law.

CONCLUSION

This Court held in 1978 in *Monell* that Congress intended that landowners use § 1983 to file takings claims against state actors in federal court. Seven years later in *Williamson*, the Court created an exhaustion rule for filing such claims in federal court without reference to the long line of cases finding that Congress intended that citizens should have direct access to federal court under § 1983. *Williamson* held that if the state recognizes a remedy for temporary regulatory takings, then no federal cause of action exists that could be asserted under federal law regardless of the forum. The Court's decision in *First English* two years after *Williamson* ironically bars landowners from ever filing the § 1983 actions that *Monell* found only 11 years earlier Congress intended that citizens could file against state actors in takings cases. *First English* held that state courts must recognize a just compensation remedy for such takings. *First English* and *Williamson* therefore combine to eliminate federal causes of action for regulatory takings. Contrary to *Monroe*, *Williamson* has displaced § 1983 as a supplemental remedy to state law.

Moreover, the separation of powers doctrine limits this Court's power to amend the jurisdictional statutes and § 1983 through the application of judicial doctrines that should only be applied to avoid premature adjudication of, rather than adjudication of all state action takings claims. Landowners have suffered resort to piecemeal litigation for the last 20 years based on the questionable reasoning of *Williamson* when no principled basis grounded in this Court's precedents or

any federal statute require the limitation on federal court review of state action takings claims. Moreover, *Williamson* has also prevented the efficient development of a cohesive body of federal law in takings cases by eliminating the lower federal courts' jurisdiction to decide substantive issues of federal takings law.

The Real Property Section of the State Bar of Michigan therefore urges the Court to grant Agripost's petition and either limit the holding of *Williamson* to its facts or overrule it to the extent that it has barred citizens from filing taking cases based on federal law in federal or even state courts.

Respectfully submitted,

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No. 08-567

Supreme Court, U.S.
FILED
NOV 21 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

AGRIPOST, LLC, *et al.*,
Petitioners,

v.

MIAMI-DADE COUNTY, FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND FRANKLIN P. KOTTSCHADE IN SUPPORT OF PETITIONERS

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November 21, 2008

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TABLE OF CONTENTS

Page(s)

INTERESTS OF THE AMICI CURIAE 1

ARGUMENT 4

I. THE COURT SHOULD GRANT CERTIORARI IN THIS CASE FOR THE SAME REASONS THAT IT SHOULD ACCEPT REVIEW IN *BRAUN V. ANN ARBOR TOWNSHIP*, NO. 08-250 4

A. Conflict Between *Williamson* and *San Remo* on Subsequent Versus Concurrent Takings Claims 6

B. Conflict Between *Williamson* and *City of Chicago*, on Removal Jurisdiction 9

C. Conflict on Application of State-Litigation Rule to Other Constitutional Claims 12

II. THIS CASE SQUARELY QUESTIONS THE VALIDITY OF THE STATE-LITIGATION RULE 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Agripost, LLC v. Miami-Dade County, 525 F.3d 1049 (11th Cir. 2008) 16, 17

Agripost, Inc. v. Miami-Dade County, 195 F.3d 1225, (11th Cir. 1999), *cert. denied*, 531 U.S. 815 (2000) 5

Asociacion de Subscripcion Conjunta del Seguro de Responsabilidad Obligatorio, v. Flores Galarza, 484 F.3d 1 (1st Cir. 2007) 5

Bateman v. City of W. Bountiful, 89 F.3d 704 (10th Cir. 1996) 14

Border Bus. Park, Inc. v. City of San Diego, 49 Cal. Rptr. 3d 259 (Cal. Ct. App. 2007), *cert. denied*, 127 S. Ct. 2280 (2007) 18

Brubaker v. E. Hempfield Twp., 234 Fed. Appx. 32 (3d Cir. 2007) 5

City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156 (1997) 9, 10, 11, 12

City of Marion v. Howard, 855 N.E. 2d 994 (Ind. 2006), *cert. denied*, 126 S. Ct. 2358 (2006) 18

City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) 18

County Concrete Corp. v. Town of Roxbury, 442 F.3d 159 (3d Cir. 2006) 13

TABLE OF AUTHORITIES (*cont.*)

Page(s)

Del-Prairie Stock Farm, Inc. v. County of Walworth, 572 F.Supp.2d 1031 (E.D. Wis. 2008) 12

Dolan v. City of Tigard, 512 U.S. 374 (1994) 19

First English Evangelical Lutheran Church of Glendale v. Los Angeles, 482 U.S. 304 (1987) 20

Forseth v. Vill. of Sussex, 199 F.3d 363 (7th Cir. 2000) 13

Front Royal and Warren County Indus. Park v. Town of Front Royal, 135 F.3d 275 (4th Cir. 1998) 13

Henry v. Jefferson County Planning Comm'n, 34 Fed. Appx. 92 (4th Cir. 2002) 5

Hillsboro Props. et al. v. City of Rohnert Park et al., 41 Cal. Rptr. 3d 441 (Cal. Ct. App. 2006), *cert. denied*, 127 S. Ct. 836 (2006) 18

Int'l Coll. of Surgeons v. City of Chicago, 153 F.3d 356 (7th Cir. 1998) 10-11

Johnson v. City of Shorewood, 2008 WL 434680 (Minn. Ct. App. 2008), *cert. denied*, 129 S. Ct. 281 (2008) 18

Koscielski v. City of Minneapolis, 435 F.3d 898 (8th Cir. 2006) 11

TABLE OF AUTHORITIES (*cont.*)

Page(s)

Kottschade v. City of Rochester, 319 F.3d 1038 (8th Cir.), *cert. denied*, 540 U.S. 825 (2003).....5, 6

McKenzie v. City of White Hall, 112 F.3d 313 (8th Cir. 1997).....14

McNamara v. City of Rittman, 473 F.3d 633 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 67 (2007).....18

Miller v. California, 413 U.S. 15 (1973).....19

Ochoa Realty Corp. v. Faria, 815 F.2d 812 (1st Cir. 1987).....13

Peters v. Fair, 427 F.3d 1035 (6th Cir. 2005).....5

Peters v. Vill. of Clifton, 498 F.3d 727 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 1472 (2008).....5, 18

Rockstead v. City of Crystal Lake, 486 F.3d 963 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 415 (2007).....18

Rocky Mountain Materials & Asphalt, Inc. v. Bd. of County Comm'rs of El Paso County, 972 F.2d 309 (10th Cir. 1992).....14

Samaad v. City of Dallas, 940 F.2d 925 (5th Cir. 1991).....5

TABLE OF AUTHORITIES (*cont.*)

Page(s)

San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005) .....*passim*

Sandy Creek Investors, Ltd. v. City of Jonestown, 325 F.3d 623 (5th Cir. 2003).....11

Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1998).....5

Sinaloa Lake Owners Ass'n. v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989).....13

Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993) 5

Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).....12

Torromeo v. Town of Fremont, N.H., 438 F.3d 113 (1st Cir. 2006), *cert. denied*, 127 S. Ct. 257 (2006).....18

Yaklich v. Grand County, 2008 WL 1986470, (10th Cir. 2008) 5

Wilkinson v. Pitkin County Bd. of Comm'rs, 142 F.3d 1319 (10th Cir. 1998).....6

Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) .....*passim*

TABLE OF AUTHORITIES (*cont.*)

Page(s)

STATUTORY PROVISIONS

28 U.S.C. § 1441(a) 9

28 U.S.C. § 1738 17

42 U.S.C. § 1983 13

OTHER

Br. of NAHB and Franklin P.Kottschade as Amici Curiae Supporting Pet'rs, *Braun v. Ann Arbor Twp.*, No. 08-250 (S. Ct. filed Sept. 24, 2008) 4, 6, 9, 13

John Delaney and Duane Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs can Enter the Federal Courthouse,* 31 Urb. Law. 195 (Spring 1999) 15

Steven J. Eagle, *Regulatory Takings*, 1062, 2d ed. (2001) 7

Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239 (2000) 7

Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37 (1995) 7

TABLE OF AUTHORITIES (*cont.*)

Page(s)

Private Prop. Rights Implementation Act of 2005: Hearing on H.R. 1534 Before the Subcomm. On Courts and Intellectual Prop. of the H. Judiciary Comm., 105th Cong. 67 (1997) (test. of Prof. Daniel R. Mandelker), *reprinted in* 31 Urb. Law. 234 (Summer 1999) 15

INTERESTS OF AMICI CURIAE

The National Association of Home Builders ("NAHB") and Franklin P. Kottschade have received the parties' written consent to file this amici curiae brief supporting petitioners.[1] NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the shelter industry. As the voice of America's housing industry, NAHB helps promote policies that will keep housing a national priority. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 235,000 members are home builders and/or remodelers, and its members construct about 80 percent of the new homes built each year in the United States.

NAHB is a vigilant advocate in the Nation's courts, and it frequently participates as a party litigant and amicus curiae to safeguard the property rights and interests of its members. NAHB was a petitioner in *NAHB v. Defenders of Wildlife*, 127 S.Ct. 2518 (2007). Attached at Appendix A to this brief is a list of cases in which

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

NAHB has participated before this Court as amicus curiae or "of counsel." A large number of those cases involved landowners and other parties aggrieved by over-zealous regulation under a wide array of statutes and regulatory programs.

NAHB's organizational policies have long supported the rights of property owners to have their constitutional claims heard by federal courts. It is troubled by the tactic of government officials to use *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), as a shield against legitimate Fifth Amendment claims. Under the conventional interpretation of *Williamson*, aggrieved landowners must run a procedural gauntlet that precludes federal court adjudication on the merits of whether an unconstitutional taking has occurred in any given situation.

A case in point is Mr. Kottschade's litigation odyssey.[2] A homebuilder and developer from Rochester, Minnesota, he has negotiated and litigated the constitutionality of government land-use decisions on his property for almost a decade, in federal and state court, and no judicial forum has ever decided the merits of his case. After months of negotiating with local officials regarding the use of his property, the City imposed financially

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[2] A more detailed description of Mr. Kottschade's voyage through the federal and state court systems is provided in Br. of NAHB and Franklin P. Kottschade as Amici Curiae in Support of Pet'rs, *Braun v. Ann Arbor Charter Twp.*, No. 08-250 (filed Sept. 24, 2008), at 18-23.

ruinous conditions on Mr. Kottschade's proposed project to develop affordable residential townhomes. He thus filed suit in federal court in June 2001, seeking just compensation for a taking of his property under the Fifth Amendment.

However, the federal courts dismissed his case for not being ripe. In 2003, the Court of Appeals for the Eighth Circuit expressed some sympathy for the jurisdictional Catch-22 that *Williamson* causes for takings plaintiffs, but its compassion only went so deep and it denied Mr. Kottschade federal court access. *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir. 2003) (state-litigation rule has created an "anomalous ... gap in Supreme Court jurisprudence"). Subsequently, this Court denied Mr. Kottschade's petition for certiorari. 540 U.S. 825 (2003). He remains mired in litigation, now in state court, and has yet to receive a decision on the merits from *any* court.

To bring attention to the jurisprudential dilemma caused by *Williamson*, Mr. Kottschade has testified before Congress to advocate for legislative reform that would confer upon property owners the right to federal court adjudication on Fifth Amendment takings claims, without an initial detour in state court. See *Private Property Rights Implementation Act of 2005: Hearing on H.R. 4772 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Franklin P. Kottschade, President, North American Realty).

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI IN THIS CASE FOR THE SAME REASONS THAT IT SHOULD ACCEPT REVIEW IN *BRAUN V. ANN ARBOR TOWNSHIP*, NO. 08-250.

A pending certiorari petition in *Braun v. Ann Arbor Charter Twp.*, No. 08-250, seeks review of a Sixth Circuit decision that blocked federal court access for a property owner who tried to vindicate a takings claim in federal court. NAHB and Mr. Kottschade also filed an amici brief in that matter, which we fully incorporate here, urging the Court to reassess *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). See Br. of NAHB and Franklin P. Kottschade as Amici Curiae Supporting Pet'rs, *Braun v. Ann Arbor Twp.*, No. 08-250 (S. Ct. filed Sept. 24, 2008) ("NAHB *Braun* Amici Br."). For the same reasons that NAHB supports this Court's review in *Braun*, it supports review of the petition in the case at bench.

The first questions presented in the petitions for this case and *Braun* both request the Court to consider whether it should "overrule" the state-litigation rule announced in *Williamson*. Compare *Agripost* Pet. at i ("Should the Court overrule *Williamson* ... insofar as it denies property owners the right to litigate their federal causes of action in federal court ....") with *Braun* Pet. at i ("Should the Court overrule *Williamson* ... insofar as it requires

property owners to seek compensation in state court ...."). The state-litigation rule provides: "[If] a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and has been denied just compensation." *Williamson*, 473 U.S. at 195. This language has been uniformly interpreted to apply to *judicial* procedures; a Fifth Amendment takings claim does not become ripe for federal court adjudication until the aggrieved property owner pursues inverse condemnation litigation in state court and loses.[3]

Both the petitions here and in *Braun* emphasize that four concurring Justices in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), stated that the state-litigation rule "may have been mistaken," and that "[i]t is not

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[3] *E.g., Asociacion de Subscripcion Conjunta del Seguro de Responsabilidad Obligatorio, v. Flores Galarza*, 484 F.3d 1, 16-19 (1st Cir. 2007); *Southview Assocs. Ltd. v. Bongartz*, 980 F.2d 84, 99-100 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); *Brubaker v. E. Hempfield Twp.*, 234 Fed. Appx. 32, 36-37 (3d Cir. 2007); *Henry v. Jefferson County Planning Comm'n*, 34 Fed. Appx. 92, 96 (4th Cir. 2002); *Samaad v. City of Dallas*, 940 F.2d 925, 933-36 (5th Cir. 1991); *Peters v. Fair*, 427 F.3d 1035, 1038 (6th Cir. 2005); *Peters v. Vill. of Clifton*, 498 F.3d 727, 731-734 (7th Cir 2007), *cert. denied*, 128 S. Ct. 1472 (2008); *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir.), *cert. denied*, 540 U.S. 825 (2003); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 405-07 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1998); *Yaklich v. Grand County*, 2008 WL 1986470 at *4-*6 (10th Cir. 2008); *Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225, 1234 (11th Cir. 1999), *cert. denied*, 531 U.S. 815 (2000).

clear that *Williamson County* was correct in demanding" that a claimant must first seek a compensation remedy through state litigation as a prerequisite to ripen a federal takings claim. *Id.* at 348-349 (Rehnquist, C.J., concurring). The *San Remo* concurring Justices believed that *Williamson's* "state-litigation rule has created some real anomalies, justifying our revisiting the issue." *Id.* at 351. NAHB wholly concurs. The pending requests for certiorari in this case and *Braun* provide appropriate vehicles to resolve these anomalies,[4] which include the following.

A. Conflict Between *Williamson* and *San Remo* on Subsequent Versus Concurrent Takings Claims.

Tension is especially pronounced between *Williamson* and *San Remo*. The *Williamson* Court stated that exhaustion of state compensation procedures is a first step to ripen federal takings claims: "*[U]ntil* [plaintiff] has utilized [state] procedure[s], its takings claim is *premature*." *Williamson*, 473 U.S. at 197 (emphasis supplied).[5]

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[4] The lower courts routinely recognize the doctrinal conflicts left in *Williamson*'s wake. See, *e.g.*, *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir.) (state-litigation rule has created an "anomalous ... gap in Supreme Court jurisprudence"), *cert. denied*, 540 U.S. 825 (2003); *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 n. 4 (10th Cir. 1998) ("It is difficult to reconcile the [state litigation] ripeness requirement of *Williamson*" with issue and claim preclusion).

[5] See also *Williamson*, 473 U.S. at 194 ("A second reason the takings claim is *not yet ripe* is that respondent did not seek

Virtually every court of appeals has interpreted this language to mean that a Fifth Amendment takings claim is not ripe — it does not exist — until a property owner has filed suit for inverse condemnation in state court and has been denied compensation. *Supra* n. 3. Many commentators also read *Williamson* as providing the opportunity for ultimate federal adjudication following denial of compensation in state court.[6]

The Court's opinion in *San Remo*, however, upends this widespread understanding. It declared that federal takings claims could, in fact, be asserted *during* a state lawsuit:

> The requirement that aggrieved property owners must seek "compensation through the procedures the State has provided for doing so" ... does not preclude state courts from hearing *simultaneously* a plaintiff's

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compensation through the procedures the state has provided for doing so") (emphasis supplied); *id.* at 195 ("the property owner cannot claim a violation of the Just Compensation Clause *until it has used* the [available state] procedure and been denied just compensation") (emphasis supplied).

[6] See, *e.g.*, Steven J. Eagle, *Regulatory Takings*, 1062, 2d ed. (2001) ("The 'ripeness' metaphor is one that promises ultimate vindication"); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 67 (1995) ("the language ... suggests that the state law is merely preparatory to a federal suit"); Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239, 249 (2000) ("language ... of *Williamson* suggests that a federal claim will survive after disposition in the state court").

> request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution.

San Remo, 545 U.S. at 346 (citing *Williamson*, 473 U.S. at 194) (emphasis supplied). Thus, while *Williamson* rules that a federal takings claim is not ripe until *after* the state denies compensation, *San Remo* rules that federal claims can be brought *simultaneously* with state claims in state court.

So, which is the rule? Are *Williamson* and *San Remo* reconcilable, or in hopeless conflict? How is it that a Fifth Amendment claim can be brought simultaneously with a state inverse condemnation claim in state court, if that federal claim is not ripe until *after* the state denies compensation? How would the process of bringing simultaneous claims work? Should the state and federal takings claims be brought in state court sequentially, in that order? Are they part of the same, or separate, lawsuits? What effect does *San Remo*'s simultaneous claim rule have on case law from the lower federal courts, cited *supra* n. 3, which have been virtually unanimous that Fifth Amendment takings claims are nascent and do not become ripe for adjudication until after state litigation is over? Are these opinions now overruled?

The petition should be granted so the Court can clarify the apparent contradictions between *Williamson*'s rule that state litigation is a condition

precedent to ripen a federal takings claim, and *San Remo*'s rule that federal and state takings cases can be brought simultaneously in state court.

B. Conflict Between *Williamson* and *City of Chicago*, on Removal Jurisdiction.

The NAHB *Braun* Amicus Br. at 11-12, and the *Agripost* Pet. at 22-25, both emphasize another anomaly arising from *Williamson* that demands resolution. The state-litigation rule is irreconcilable with this Court's view of removal jurisdiction from *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997). There, a plaintiff brought both federal and state takings claims in state court. The city then removed the case to federal court. This Court, without discussing *Williamson*, allowed the removal to stand because "a case containing claims that local administrative action violates federal law ... is within the jurisdiction of the federal district courts." *Id.* at 528-529. Under the federal removal statute,[7] a case can be removed from state to federal court only if it could have been brought in federal court *originally*.

Therein, the seeds of more conflict are sown. Under *Williamson*, federal courts do *not* have original jurisdiction over federal takings claims because they are not ripe until the property owner

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[7] "[A]ny civil action brought in a State court of which the district courts of the United States have *original jurisdiction*, may be removed by the defendant ... to the district court." 28 U.S.C. § 1441(a) (emphasis supplied.)

brings state litigation and loses. *San Remo* confirms that there is no original federal court jurisdiction over federal takings claims, and counsels that they may be brought simultaneously with state inverse condemnation claims in state court. Yet under *City of Chicago,* federal courts *do* have original jurisdiction over federal takings claims because a municipality may remove them to federal court. The consequence is that federal courts decide takings claims only at the whim of municipal defendants who decide to exercise their removal option. The petition should be granted to address the dilemma created by *Williamson, San Remo,* and *City of Chicago,* as to whether federal courts do, in fact, possess "original jurisdiction" over Fifth Amendment takings claims.

The conflict over *Williamson*'s rule that takings claims must go to state court first, and *City of Chicago*'s rule that takings claims can be brought originally in federal court, has predictably devolved into lower court confusion. Federal judges have split on whether they have jurisdiction to decide Fifth Amendment takings claims that bypass initial state litigation, due to case removal from state to federal court by local government defendants. The Seventh Circuit, on remand in *City of Chicago,* decided it could resolve a removed federal takings claim on the merits, despite the lack of prior state litigation. *Int'l Coll. of Surgeons v. City of Chicago,* 153 F.3d 356, 360 (7th Cir. 1998). In contrast, the Eighth Circuit has held it lacked jurisdiction over a federal takings claim that a municipal defendant removed to federal court,

precisely because no original state proceedings ripened the federal claim. The stunning aspect of this decision is that the federal court dismissed for lack of jurisdiction, even though the plaintiff filed initially in state court and was forced into federal court upon the city's removal motion. *Koscielski v. City of Minneapolis,* 435 F.3d 898, 903-904 (8th Cir. 2006). The Fifth Circuit has similarly whipsawed a takings plaintiff who filed suit originally in state court, only to see a municipal defendant remove the matter to federal court — and then argue for dismissal because *Williamson*'s state-litigation rule went unsatisfied. The city was rewarded for its chutzpah by dismissal of the case. *Sandy Creek Investors, Ltd. v. City of Jonestown,* 325 F.3d 623, 626 (5th Cir. 2003).

Constitutional rights are made illusory in this system of municipal gamesmanship, where courts and local governments bob and weave through a ripeness maze that allows them to hide from the merits of takings claims. A federal judge recently expressed his discontent with this state of affairs:

> *Williamson County* and *City of Chicago* are in direct conflict. Under *Williamson County,* a regulatory takings claim is not ripe until state litigation is complete. Thus, a regulatory takings claim cannot be the basis for removal from state court because the claim will never be ripe — removal will always occur prior to the completion of state litigation. However, *City of Chicago* permitted a regulatory takings claim to be

> removed. Either *City of Chicago* erroneously permitted removal, or *City of Chicago* implicitly held that the regulatory takings claim was ripe — a *sub silentio* elimination of the *Williamson County* State Litigation prong.

Del-Prairie Stock Farm, Inc. v. County of Walworth, 572 F.Supp.2d 1031, 1033 (E.D. Wis. 2008).

"[C]onsiderations of fairness and justice" lie at the heart of the Takings Clause. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 333 (2002). It is neither fair nor just to allow a municipal defendant to remove a takings case to federal court, and then seek and receive a dismissal for lack of a prior state ripening suit. This Court's decisions are irreconcilable, and the circuits have thus become split on how to handle removed takings cases. This Court should address the conflict.

C. Conflict on Application of State-Litigation Rule to Other Constitutional Claims.

The lower federal courts also clash on whether the state-litigation rule applies to due process and equal protection claims, in addition to takings claims. In many constitutional property rights cases, plaintiffs assert some combination of takings, due process, and equal protection violations under 42 U.S.C. § 1983. In *Braun*, for example, the Sixth Circuit remarked it is unclear whether due process and equal protection claims

must satisfy *Williamson*'s exhaustion requirements. *Braun*, 519 F.3d at 572. While holding that the Brauns' procedural due process claims must satisfy the exhaustion requirements, the Sixth Circuit assumed the substantive due process claims do not. Furthermore, with respect to equal protection, *Braun* recognized that "conflicting case law exists" concerning whether *Williamson* applies. *Id.* at 574. In comparison, the Seventh Circuit has held that *Williamson*'s exhaustion requirement applies to both taking and substantive due process claims, yet not equal protection claims. *Forseth v. Vill. of Sussex*, 199 F.3d 363, 370-71 (7th Cir. 2000); See also *Ochoa Realty Corp. v. Faria*, 815 F.2d 812, 817 n.4 (1st Cir. 1987) (providing that state inverse condemnation claims must be exhausted for *both* federal takings and due process claims, without opining on equal protection.). Finally, some circuits restrict *Williamson*'s state remedies requirement to takings claims *only*.[8]

The Tenth Circuit has issued two, irreconcilable rulings on this point. It has applied *Williamson*'s state-litigation rule to takings and procedural due

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[8] See, *e.g.*, *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 169 (3d Cir. 2006) ("[G]iven that the 'exhaustion of just compensation procedures' requirement only exists due to the 'special nature of the Just Compensation Clause,' it is inapplicable to appellants' facial [substantive due process] and [equal protection] claims"; citations omitted). Accord *Sinaloa Lake Owners Ass'n. v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989); *Front Royal and Warren County Indus. Park v. Town of Front Royal*, 135 F.3d 275, 283 n.3 (4th Cir. 1998); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997).

process claims brought under section 1983. See *Rocky Mountain Materials & Asphalt, Inc. v. Bd. of County Comm'rs of El Paso County*, 972 F.2d 309, 311 (10th Cir. 1992). Yet it has also ruled that the state-litigation rule is *not* applicable to any claims sounding in takings, due process, or equal protection, because a plaintiff "need not exhaust his available administrative remedies prior to filing a § 1983 action ...." See *Bateman v. City of W. Bountiful*, 89 F.3d 704, 708 (10th Cir. 1996). Accordingly, the lower court conflict on whether the state-litigation rule encompasses due process and equal protection (as well as takings) claims is another reason that justifies reconsideration of *Williamson*.

These anomalies – (1) the divergence between *Williamson* and *San Remo* on subsequent as opposed to concurrent federal takings claims, (2) the confusion on removal jurisdiction, and (3) whether state litigation must precede federal court review of due process and equal protection claims – when coupled with the preclusion doctrines of res judicata and collateral estoppel, all operate to bar judicial review of Fifth Amendment claims by *any* court. As former Chief Justice Rehnquist recognized, the state-litigation rule effectively "precludes litigants from asserting their federal claims even in state court." *San Remo*, 545 U.S. at 342, n. 2 (Rehnquist, C.J., concurring). This is because many states refuse to entertain federal takings claims until compensation is finally denied under state law, and collateral estoppel works to bar subsequent consideration of federal issues

because the state law issues were decided first. At the same time, *Williamson* (mal)functions so as to "ensure[ ] that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court ...." *Id.* at 351 (Rehnquist, C.J., concurring).[9]

If federal takings claims are to be decided exclusively by state courts, with no further access to federal court, then this Court should clearly state that is the case. If preclusion doctrines bar adjudication of a federal claim in state court *and* access to federal court after state proceedings, this Court should so declare. In short, whether *any* state or federal forum is open to decide the merits of Fifth Amendment takings claims – and if so *which* forum is the appropriate one to adjudicate a

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[9] This is exactly what has transpired. By the mid-1990s, the lower federal courts overwhelmingly invoked the state-litigation rule to avoid adjudicating the merits of Fifth Amendment takings claims. See John Delaney and Duane Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs can Enter the Federal Courthouse*, 31 Urb. Law. 195, 203-205 (Spring 1999) (surveying all land-use takings cases with a federal court decision from 1990-1998). As a preeminent takings scholar testified before Congress, the lower federal courts have exhibited "wholesale abdication of federal jurisdiction" over Fifth Amendment claims and have achieved the "undeserved and unwarranted result [of] avoid[ing] the vast majority of takings cases on their merits." *Private Prop. Rights Implementation Act of 2005: Hearing on H.R. 1534 Before the Subcomm. on Courts and Intellectual Prop. of the H. Judiciary Comm.*, 105th Cong. 67 (1997) (test. of Prof. Daniel R. Mandelker), *reprinted in* 31 Urb. Law. 234 (Summer 1999).

Bill of Rights provision – are significant constitutional question for this Court to clarify.

II. THIS CASE SQUARELY QUESTIONS THE VALIDITY OF THE STATE-LITIGATION RULE.

The decision below provides a textbook example of *Williamson*'s effect in barring federal courts from deciding Fifth Amendment takings claims on their merits. While the state-litigation rule was not teed-up for this Court's consideration in *San Remo*, it is directly in play in the case at bench. Here, Petitioners' land-use permit was revoked, they filed suit in state court over the revocation, and they lost. *Agripost, LLC v. Miami-Dade County,* 525 F.3d 1049, 1051 (11th Cir. 2008). Petitioners then sought Fifth Amendment just compensation in federal court; that claim was dismissed as unripe *à la Williamson* because the compensation remedy was never sought in state court first. *Id.* Returning to state court on a state law inverse condemnation claim (while reserving the Fifth Amendment claim for subsequent federal review), Petitioners were denied compensation because they were found to not have a protectable property interest. *Id.* at 1052.

A final foray back to federal court proved futile, as the court of appeals decided that issue preclusion barred adjudication on the merits of the Fifth Amendment cause of action. *Id.* at 1056. Thus, after two rounds of litigation through the federal and state systems, the ironic synergy

between *Williamson*'s state-litigation rule and preclusion doctrine worked yet again to deprive a property owner the benefit of a federal review on the merits of a Bill of Rights claim.

In *San Remo,* many *amici* (including NAHB) urged the Court to directly confront *Williamson.* But the invitation was declined because "no court below ha[d] addressed the correctness of *Williamson County,* neither party ha[d] asked us to reconsider it, and resolving the issue could not [have] benefit[ed] petitioners." *San Remo,* 545 U.S. at 352. (Rehnquist, C.J., concurring). The converse is true here. First, the court of appeals *did* consider *Williamson*'s impact,[10] and second, the petition's first question plainly asks the Court to reassess the state-litigation rule.

Third, resolving the issue would benefit Petitioners. If the Court reconsiders the state-litigation rule and removes it from the ripeness landscape, a remand would be appropriate to allow Petitioners the right of a federal jury trial under the Seventh Amendment to develop their takings claim on a complete factual record. See *City of Monterey v. Del Monte Dunes,* 526 U.S. 687, 719 (1999) (takings plaintiffs in Section 1983 litigation have a Seventh Amendment right to a jury trial on issues of government liability).

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[10] "In short, the interaction of [the Full Faith and Credit Statute, 28 U.S.C.] § 1738 and *Williamson County* might deprive the plaintiff of the chance to litigate his Takings Clause claim in a federal forum ...." *Agripost,* 525 F.3d at 1052 (emphasis supplied).

To date, the Court has denied at least eight petitions for certiorari requesting review of *Williamson* since the *San Remo* decision.[11] At this juncture, further postponing review will not contribute to resolution of the open questions generated by *Williamson*, inconsistencies within this Court's takings jurisprudence will linger, and conflicting lower court decisions will proliferate. Respectfully, NAHB encourages this Court to grant the petitions in *Agripost* and *Braun*, reconsider the state-litigation element of *Williamson*'s ripeness doctrine — and dispense with it.

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[11] See *Johnson v. City of Shorewood*, 2008 WL 434680 (Minn. Ct. App. 2008), *cert. denied*, 129 S. Ct. 281 (2008) *Border Bus. Park, Inc. v. City of San Diego*, 49 Cal. Rptr. 3d 259 (Cal. Ct. App. 2007), *cert. denied*, 127 S. Ct. 2280 (2007), *Hillsboro Props. et al. v. City of Rohnert Park et al.*, 41 Cal. Rptr. 3d 441 (Cal. Ct. App. 2006), *cert. denied*, 127 S. Ct. 836 (2006), *Rockstead v. City of Crystal Lake*, 486 F.3d 963 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 415 (2007), *Torromeo v. Town of Fremont, N.H.*, 438 F.3d 113 (1st Cir. 2006), *cert. denied*, 127 S. Ct. 257 (2006), *Peters v. Vill. of Clifton*, 498 F.3d 727 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 1472 (2008), *McNamara v. City of Rittman*, 473 F.3d 633 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 67 (2007), *City of Marion v. Howard*, 855 N.E. 2d 994 (Ind. 2006), *cert. denied*, 126 S. Ct. 2358 (2006).

CONCLUSION

It is time to end the fiction that the Fifth Amendment requires a litigant to run an initial gauntlet through the state court system before the constitutional takings claim ripens. The exercise of constitutional rights can, and often does, hinge on traditionally "local" issues. Yet these highly parochial concerns face no barriers to federal court jurisdiction outside the takings context. For example, the First Amendment does not protect all speech; obscene material is not protected. Whether an artistic or literary work is obscene is determined by "contemporary community standards" and definitions under the "applicable state law." *See Miller v. California,* 413 U.S. 15, 24 (1973). In the First Amendment arena, there is no requirement that a plaintiff litigate such provincial matters in state court first before the doors to the federal courthouse are unlocked.

Why should a takings litigant be treated differently? The Fifth Amendment certainly does not say, "nor shall private property be taken for public use without the payment of just compensation, *where a demand for such compensation is first made in a state court.*" This Court "see[s] no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation ...." *Dolan v. City of Tigard,* 512 U.S. 374, 393 (1994). With respect, that is an empty sentiment if the substance of the Takings Clause

cannot be interpreted by, and a property owner cannot seek the constitutionally-mandated remedy of just compensation in, the federal judiciary.

When *Williamson* was decided in 1985, this Court's modern takings jurisprudence was still in its infancy. Indeed, only after *Williamson,* in *First English Evangelical Lutheran Church of Glendale v. Los Angeles,* 482 U.S. 304 (1987), did this Court even decide that monetary compensation was the self-effecting remedy required by the Takings Clause. Since then, the contours of the Fifth Amendment's substantive protections have become somewhat more defined by this Court, but the most basic, fundamental jurisdictional question — "Can a federal court ever decide a federal takings claim?" — remains undeciphered.

This question of whether Fifth Amendment takings litigants can access the federal courts is of overwhelming constitutional importance.

For the foregoing reasons, the petitions in the case at bench, and in No. 08-250, should both be granted.

November 21, 2008.

Respectfully submitted,

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APPENDIX

APPENDIX A

Cases in which NAHB has appeared as an amicus curiae or "of counsel" before this Court include:

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113 (4)

No. 08-567

Supreme Court, U.S.
FILED
NOV 24 2008
OFFICE OF THE CLERK

In the

Supreme Court of the United States

AGRIPOST, LLC, a Florida Limited Liability Company (successor by merger to Agripost, Inc.), and AGRI-DADE, Ltd., a Florida limited partnership,

Petitioners,

v.

MIAMI-DADE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST AND IDENTITY OF AMICUS CURIAE 1

INTRODUCTION 3

REASONS FOR GRANTING THE WRIT 5

I. THE CASE RAISES AN IMPORTANT ISSUE AS TO WHETHER *WILLIAMSON COUNTY*'S STATE LITIGATION REQUIREMENT SHOULD BE OVERRULED DUE TO ITS REGRESSIVE EFFECT ON FEDERAL JURISDICTION OVER PROPERTY RIGHTS CLAIMS 5

A. The State Compensation Requirement Wreaks Havoc on the Jurisdictional Framework Governing Federal Takings Claims 6

1. The State Compensation Ripeness Rule Conflicts with Res Judicata Principles, So That a "Ripe" Takings Claim Is Precluded from Federal Court 6

2. The State Procedures Requirement Confounds Removal Jurisdiction in the Takings Context 9

B. The State Procedures Requirement Has Caused Similar Confusion in the Area of Federal Jurisdiction over Due Process Claims 12

TABLE OF CONTENTS—Continued

Page

1. Some Courts Have Extended *Williamson County* to Procedural Due Process Claims, Barring Those Claims from Federal Courts 12

2. *Williamson County* Also Damages Jurisdiction over Substantive Due Process Claims 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

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Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza, 484 F.3d 1 (1st Cir. 2007) 4

Bateman v. City of West Bountiful, 89 F.3d 704 (10th Cir. 1996) 12

Bickerstaff Clay Products Co., Inc. v. Harris County, 89 F.3d 1481 (11th Cir. 1996) 14

Bigelow v. Michigan Dep't of Natural Res., 970 F.2d 154 (6th Cir. 1992) 9

Braun v. Ann Arbor Charter Twp., 519 F.3d 564 (6th Cir. 2008)(*petition for certiorari filed*, No. 08-250) 2, 8, 12

Carrollton Properties, Ltd. v. City of Carrollton, 2006 WL 2559535 (E.D. Tex. 2006) 10

Crown Point Dev., Inc. v. City of Sun Valley, 506 F.3d 851 (9th Cir. 2007) 14

DLX, Inc. v. Kentucky, 381 F.3d 511 (6th Cir. 2004) 4, 7

Dodd v. Hood River County, 59 F.3d 852 (9th Cir. 1995) 9

Doney v. Pacific County, 2007 WL 1381515 (W.D. Wash. 2007) 10

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TABLE OF AUTHORITIES—Continued

Page

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Greenfield Mills, Inc. v. Macklin, 361 F.3d 934 (7th Cir. 2004) 12

Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913) 15

J. B. Ranch, Inc. v. Grand County, 958 F.2d 306 (10th Cir. 1992) 13

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) 14

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 2

Macri v. King County,126 F.3d 1125 (9th Cir. 1997) 14

Miller v. Campbell County, 945 F.2d 348 (10th Cir. 1991) 12

Montgomery v. Carter County, 226 F.3d 758 (6th Cir. 2000) 14

Moore v. Covington County Comm'n, 2007 WL 1771384 (M.D. Ala. 2007) 10

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 1

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TABLE OF AUTHORITIES—Continued

Page

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498 F.3d 727 (7th Cir. 2007),
cert. denied,128 S. Ct. 1472 (2008) 2

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Memphis and Shelby County Bd.
of Adjustment, 967 F. Supp. 998
(W.D. Tenn. 1997) 13

Rapanos v. United States,
547 U.S. 715 (2006) 1-2

Reahard v. Lee County,
30 F.3d 1412 (11th Cir. 1994) 10-11

River Park, Inc. v. City of Highland Park,
23 F.3d 164 (7th Cir. 1994) 14

Rockstead v. City of Crystal Lake,
486 F.3d 963 (7th Cir. 2007) 7

Rocky Mountain Materials & Asphalt,
Inc. v. Board of County Comm'rs,
972 F.2d 309 (10th Cir. 1992) 12-13

San Remo Hotel v. City and County of
San Francisco, 545 U.S. 323 (2005) . . . 3-4, 8-9, 11

Sandy Creek Investors, Ltd. v. City of
Jonestown, 325 F.3d 623 (5th Cir. 2003) . . . 10-11

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 11

Smith v. Allwright, 321 U.S. 649 (1944) 11

Suitum v. Tahoe Reg'l Planning
Agency, 520 U.S. 725 (1997) 1

TABLE OF AUTHORITIES—Continued

Page

Trafalgar Corp. v. Miami County Bd. of Comm'rs, 519 F.3d 285 (6th Cir. 2008) 8

W.J.F. Realty Corp. v. Town of Southampton, 220 F. Supp. 2d 140 (E.D.N.Y. 2002) 6-7

Wilkinson v. Pitkin County Bd. of County Comm'rs, 142 F.3d 1319 (10th Cir. 1998) 13

Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) ..... *passim*

Zinermon v. Burch, 494 U.S. 113 (1990) 13

Federal Statutes

28 U.S.C. § 1331 15

§ 1441(b) 9

Rules

Supreme Court Rule 37.2(a) 1

Rule 37.6 1

Miscellaneous

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TABLE OF AUTHORITIES—Continued

Page

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INTEREST AND IDENTITY OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property, individual liberty, and economic freedom. Founded 35 years ago, PLF is the largest and most experienced legal organization of its kind. PLF maintains its headquarters office in Sacramento, California, and has regional offices in Bellevue, Washington, and Stuart, Florida. The Foundation is supported primarily by donations from individuals interested in the preservation of traditional individual liberties.

PLF attorneys have considerable experience litigating, as lead counsel and amicus curiae, in defense of constitutionally protected property rights. PLF attorneys have regularly appeared before this Court as lead counsel on behalf of landowners whose ability to use their property was unlawfully curtailed. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Rapanos v. United States*, 547 U.S. 715

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

(2006). PLF also routinely participates in important property rights cases as amicus curiae. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The instant petition raises a significant question as to the circumstances under which a property owner can obtain just compensation in federal courts for regulations that prevent the use of, and thereby take, private property. In particular, the petition asks whether this Court should reconsider *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985), to the extent it demands that a property owner engage in state court litigation in order to ripen federal jurisdiction over a Fifth Amendment takings claim. PLF attorneys have a wealth of experience on this issue. PLF attorneys have acted as lead counsel in many federal cases questioning the correctness of *Williamson County*'s state litigation requirement. *See, e.g., Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564 (6th Cir. 2008) (*petition for certiorari filed*, No. 08-250); *Peters v. Village of Clifton*, 498 F.3d 727 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 1472 (2008).

PLF attorneys also have published numerous law review articles addressing the impact of *Williamson County* on federal constitutional protection for private property. J. David Breemer, *You Can Check Out But You Can Never Leave: The Story of The San Remo Hotel—The Supreme Court Relegates Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review*, 33 B.C. Envtl. Aff. L. Rev. 247 (2006); J. David Breemer, *Overcoming* Williamson County*'s State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse*

Door to Ripe Takings Claims, 18 J. Land Use & Envtl. L. 209 (2003); James S. Burling, *When Is A Claim Against the Government Ripe? Takings, Equal Protection, Due Process and First Amendment Challenges*, ALI-ABA Continuing Legal Education: Inverse Condemnation Related, Vol. 35 (2004).

PLF believes its experience in litigating and publishing on matters pertaining to federal jurisdiction over federal takings claims will assist this Court in deciding whether to grant the petition in this case.

INTRODUCTION

This case challenges the doctrine, arising from *Williamson County*, 473 U.S. at 194, that a private property owner must unsuccessfully pursue just compensation in state court in order to ripen a Fifth Amendment takings claim and, potentially, other constitutional claims. In the decades since *Williamson County*, the justifications for demanding a state court denial of compensation for ripeness have wilted. *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 350-52 (2005) (Rehnquist, C.J., concurring). Moreover, the "go to state court first" rule has proven to be incompatible with traditional rules of justiciability, such as res judicata, which generally bars federal review of claims previously rejected by state courts. The state court litigation ripeness predicate also undermines the government's statutory right to remove a federal takings claim. As a whole, *Williamson County* often banishes property owners with federal takings and due process claims from federal courts, without any indication this was intended, and without any coherent doctrinal justification. For all these reasons, lower

courts and commentators have expressed deep frustration with *Williamson County*. *See Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 17 (1st Cir. 2007); *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992); James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO Sup. Ct. Rev. 39 (Mark K. Moller ed. 2005); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37 (1995); Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Rep. 17 (1997).

Recognizing *Williamson County*'s infirmities, the late Chief Justice William Rehnquist and three other Justices of this Court declared in *San Remo* that "[i]n an appropriate case" this Court should "reconsider" the rule that federal takings claimants "must first seek compensation in state courts." 545 U.S. at 352 (Rehnquist, C.J., concurring). This Court should now act on the *San Remo* concurrence by granting the Petition for Certiorari for the purpose of reconsidering the state litigation ripeness rule.

REASONS FOR GRANTING THE WRIT

I

THE CASE RAISES AN IMPORTANT ISSUE AS TO WHETHER *WILLIAMSON COUNTY*'S STATE LITIGATION REQUIREMENT SHOULD BE OVERRULED DUE TO ITS REGRESSIVE EFFECT ON FEDERAL JURISDICTION OVER PROPERTY RIGHTS CLAIMS

In *Williamson County*, this Court considered whether a takings claim based on the economic effect of a land use regulation was ripe. 473 U.S. at 174. The Court initially ruled that the claimant lacked a ripe claim because there was no "final agency decision" on application of the suspect land use regulations. *Id.* at 188-90. Although this effectively decided the case, the *Williamson County* Court went on to articulate a second, more novel ripeness barrier. In particular, the Court ruled, for the first time, that a federal takings claim seeking compensation would not ripen until the claimant unsuccessfully sought and was denied just compensation through a state's compensation procedures. 473 U.S. at 194, 197. It is this requirement that is at issue here.

As the following shows, the state litigation ripeness requirement has turned out to be far more that a mere ripeness hurdle to federal takings review. Due to its interaction with preexisting limits on federal jurisdiction, the state litigation requirement functions as a rule that strips federal courts of original and removal jurisdiction over federal takings claims, and creates gross confusion on jurisdiction over due process claims.

A. The State Compensation Requirement Wreaks Havoc on the Jurisdictional Framework Governing Federal Takings Claims

1. The State Compensation Ripeness Rule Conflicts with Res Judicata Principles, So That a "Ripe" Takings Claim Is Precluded from Federal Court

Everything in *Williamson County* suggests that the state litigation rule was designed to allow federal judicial review of a federal takings after state court litigation failed to secure just compensation for the aggrieved property owner. 473 U.S. at 194-96. Yet, in practice, a property owner's compliance with the state litigation rule has no ripening effect; instead, it *bars* federal review because state litigation triggers res judicata principles when the owner attempts to invoke federal review.

As one court explained:

> *Williamson* and its progeny place Plaintiffs in a precarious situation. Plaintiffs must seek redress from the State court before their federal taking claims ripen, and failure to do so will result in dismissal by the federal court. However, once having gone through the State court system, plaintiffs who then try to have their federal claims adjudicated in a federal forum face, in many cases, potential preclusion defenses. This appears to preclude completely litigants such as those in the case at bar from bringing federal taking claims in a federal forum . . . .

W.J.F. Realty Corp. v. Town of Southampton, 220 F. Supp. 2d 140,146 (E.D.N.Y. 2002).

The Seventh Circuit made similar observations:

> Although the *Williamson* line of cases that requires the property owner to seek compensation in the state courts speaks in terms of "exhaustion" of remedies, that is a misnomer. For if . . . the property owner goes through the entire state proceeding, and he loses, he cannot maintain a federal suit. The failure to complain of the taking under federal as well as state law is a case of "splitting" a claim, thus barring by virtue of the doctrine of res judicata a subsequent suit under federal law.

Rockstead v. City of Crystal Lake, 486 F.3d 963, 968 (7th Cir. 2007).

This res judicata problem is particularly vexing to courts and litigants because *Williamson County* did not anticipate it, or account for its effect in banishing federal takings claims to state court. *DLX*, 381 F.3d at 521 ("The barring of the federal courthouse door to takings litigants seems an unanticipated effect of *Williamson County*, and one which is unique to the takings context, as other § 1983 plaintiffs do not have the requirement of filing prior state-court actions."). Faced with the disconnect between *Williamson County*'s ripeness intent, and its actual effect in triggering preclusion, some courts have tried to craft res judicata exceptions that would allow "ripened" takings claims in federal court. *See DLX*, 381 F.3d at 519-21 (describing method to reserve federal claims); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d at 1303-06 (same).

In the 2005 *San Remo Hotel* decision, this Court rejected court-created exceptions to res judicata in the takings context. 545 U.S. at 338, 344-45. Yet, *San Remo* did not alter *Williamson County* or its instruction that unsuccessful state court compensation procedures will "ripen" federal review of takings claims. As a result, this Court's jurisprudence continues to offer takings litigants and federal courts two conflicting sets of rules. On the one hand, *Williamson County* says that unsuccessful pursuit of a just compensation claim in state court will render a federal takings claim "complete" and ready for federal review. 473 U.S. at 194-96. On the other hand, *San Remo* and other cases strictly construing the Full Faith and Credit Act declare that prosecution of claims in state court will entirely preclude subsequent federal review. 545 U.S. at 344-45. Not surprisingly, federal courts also continue to issue inherently contradictory precedent on the availability of jurisdiction over a federal takings claim. *Compare Braun*, 519 F.3d at 569 ("in order for a plaintiff to bring a takings claim in federal court, he or she must first pursue available remedies in state court"), *with Trafalgar Corp. v. Miami County Bd. of Comm'rs*, 519 F.3d 285, 287 (6th Cir. 2008) (because "the issue of just compensation under the Takings clause . . . was directly decided in a previous state court action, it cannot be re-litigated in federal district court").

Williamson County accordingly operates as a jurisdictional dead-end, rather than a takings ripeness prerequisite, as it commands would-be federal takings plaintiffs to take state litigation steps that permanently bar federal review. This was not by design. *Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995) ("We disagree . . . with the suggestion that *Williamson County* is a thinly-veiled attempt by the Court to

eliminate the federal forum for Fifth Amendment taking plaintiffs . . . ."); Daniel Mandelker, *et al.*, *Federal Land Use Law* 4A-23 (1998) ("The Supreme Court could hardly have intended the ripeness rules to become a trap for federal litigants."). As the *San Remo* concurrence urged, it is time for the Court to reconsider *Williamson County*'s state litigation ripeness requirement in light of its effect in creating the res judicata trap and other jurisdictional anomalies. *San Remo*, 545 U.S. at 348-52 (Rehnquist, C.J., concurring).

2. The State Procedures Requirement Confounds Removal Jurisdiction in the Takings Context

The state litigation rule does not cause chaos and unfairness only in the context of original federal jurisdiction over takings claims. It also has torn removal jurisdiction from its traditional moorings. Typically, a government defendant can remove a complaint raising a constitutional claim to federal court. *See* 28 U.S.C. § 1441(b) (removal depends on "original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States"). But takings defendants do not have a recourse to this usual rule. Since compliance with the state court litigation ripeness requirement is considered a threshold jurisdictional barrier to federal takings claims, *see Bigelow v. Michigan Dep't of Natural Res.*, 970 F.2d 154, 157 (6th Cir. 1992) ("If a claim is unripe, federal courts lack subject matter jurisdiction."), takings defendants cannot remove a federal takings claim when it is filed in state court because it is unripe.

Many district courts considering takings removal have indeed concluded that a plaintiff's lack of compliance with *Williamson County* bars a defendant from removing a Fifth Amendment takings claim. *Moore v. Covington County Comm'n*, 2007 WL 1771384, at *3 (M.D. Ala. 2007) ("Because the defendants removed this case to federal court before the plaintiffs could pursue their claims in state court, this court lacks jurisdiction."); *Doney v. Pacific County*, 2007 WL 1381515, at *4 (W.D. Wash. 2007) ("[B]ecause Plaintiffs have not adjudicated an inverse condemnation claim in state court, the federal takings claim is not yet ripe and should accordingly be remanded to state court."); *Carrollton Properties, Ltd. v. City of Carrollton*, 2006 WL 2559535, at *2 (E.D. Tex. 2006) (denying removal because "[p]laintiffs have not unsuccessfully pursued just compensation in state court, thus the claim is not ripe, and it is not a federal question").

Other federal courts have failed to recognize that *Williamson County* precludes removal of a federal takings claim that is "unripe" under *Williamson County*'s state litigation requirement. When this happens, the takings plaintiff is subjected to an unjust, Kafkaesque process in which he is dragged by a defendant into a federal forum supposedly off-limits to a takings complaint, forced to litigate there (perhaps for years), only to be told on appeal—after resources are drained—that the claim has to go back to state court where it all started because *Williamson County* was not satisfied. *See Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 625-26 (5th Cir. 2003) (removal allowed, landowner wins on merits in trial court, but on appeal, Fifth Circuit remands case to state court where initially filed due to lack of compliance with *Williamson County*); *Reahard v. Lee County*, 30 F.3d

1412, 1418 (11th Cir. 1994) (remanding removed takings claim back to state court after five years of federal litigation, including on the merits and two circuit court appellate opinions, based on lack of state court compensation proceedings).

After two decades, it is clear that *Williamson County*'s state litigation rule does not operate as a ripeness predicate. It is a jurisdictional trick played upon both plaintiffs and defendants that totally closes the federal courts to Fifth Amendment claims without ever saying so, and without any sound doctrinal basis for such a result. *San Remo*, 545 U.S. at 350-51 (Rehnquist, C.J., concurring). Given the serious and well-documented jurisdictional chaos arising from *Williamson County*'s state litigation ripeness rule, this Court should end the *Williamson County* regime. Although precedent is not to be lightly overturned, when a rule—such as the state litigation predicate—is unworkable, this Court will abandon it. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63 (1996) ("'[W]hen governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent."'" (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944))).

B. The State Procedures Requirement Has Caused Similar Confusion in the Area of Federal Jurisdiction over Due Process Claims

While *Williamson County* articulated and applied the state litigation rule only to a Fifth Amendment takings claim seeking just compensation, 473 U.S. at 196 (applying only the "final decision" prong to a due process claim), its pernicious jurisdictional effects have not been limited to that context. Rather, because some federal circuit courts have extended the state litigation requirement to federal due process claims arising from land use disputes, they have infected due process doctrine with the same jurisdictional confusion and unfairness that has damaged federal takings law.

1. Some Courts Have Extended *Williamson County* to Procedural Due Process Claims, Barring Those Claims from Federal Courts

The Sixth, Seventh and Tenth Circuits have concluded that the state litigation rule applicable to federal takings claims also applies to procedural due process claims arising from land use disputes. *Braun v. Ann Arbor Charter Twp.*, 519 F.3d at 572-73; *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 961-62 (7th Cir. 2004); *Forseth v. Village of Sussex*, 199 F.3d 363, 368 (7th Cir. 2000); *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996) ("The Tenth Circuit repeatedly has held that the [second] ripeness requirement of *Williamson* applies to due process and equal protection claims that rest upon the same facts as a concomitant takings claim."); *Miller v. Campbell County*, 945 F.2d 348, 352-53 (10th Cir. 1991); *Rocky Mountain Materials & Asphalt, Inc. v. Board of County*

Comm'rs, 972 F.2d 309, 311 (10th Cir. 1992); *J. B. Ranch, Inc. v. Grand County*, 958 F.2d 306, 309-10 (10th Cir. 1992).

In extending *Williamson County* to the due process arena, the foregoing decisions have effectively wiped out the constitutional guarantee of procedural due process in federal courts for permit-seeking real property owners. After all, if, as those courts hold, federal review of a land use procedural due process claim is contingent on completed state litigation under *Williamson County*, that litigation will trigger res judicata, rather than ripeness, over the procedural due process claim when raised in federal court. *See Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319, 1322-23 (10th Cir. 1998); *Rainey Bros. Constr. Co., Inc. v. Memphis and Shelby County Bd. of Adjustment*, 967 F. Supp. 998, 1004 (W.D. Tenn. 1997). In short, holding a procedural due process claim subject to *Williamson County*'s state litigation rule results in the unprecedented abdication of federal jurisdiction over an explicit federal constitutional provision: the procedural component of the Due Process Clause. Nothing in this Court's precedent supports this. *See, e.g, Zinermon v. Burch*, 494 U.S. 113, 128-36 (1990) (holding that a procedural due process claimant challenging a nonrandom deprivation of property need not exhaust adequate state court remedies).

2. *Williamson County* Also Damages Jurisdiction over Substantive Due Process Claims

In addition to extending *Williamson County*'s state litigation takings rule to procedural due process claims, some courts have applied it to substantive due process property rights claims. *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994); *Macri v. King County*,126 F.3d 1125, 1128-30 (9th Cir. 1997); *Montgomery v. Carter County*, 226 F.3d 758, 669-70 (6th Cir. 2000); *Bickerstaff Clay Products Co., Inc. v. Harris County*, 89 F.3d 1481, 1490-91 (11th Cir. 1996). Sometimes, the expansion of *Williamson County* to the substantive due process context is direct. *River Park*, 23 F.3d at 167. Other times, courts first conclude that substantive due process claims are subsumed in the explicit protections of the Takings Clause; this ruling then triggers application of the state litigation rule. *Macri*, 126 F.3d at 1128-30. Neither approach enjoys support in this Court's law. *See Williamson County*, 473 U.S. at 197-99 (applying the final decision ripeness rule, but *not* the state litigation rule, to a due process claim); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542-44 (2005) (distinguishing takings and due process doctrine); *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 856 (9th Cir. 2007) ("We now explicitly hold that the Fifth Amendment does not invariably preempt a claim that land use action lacks any substantial relation to the public health, safety, or general welfare.").

Nevertheless, the reality is that, in some circuits, property owners who seek to challenge arbitrary property regulation under substantive due process precedent will find their claims barred by *Williamson*

County's state litigation requirements, despite its origin in takings concepts. The result is the closing off of the federal courthouse doors to land use substantive due process claims, even as other classes of litigants have full recourse to substantive due process guarantees.

Thus, under the guise of "ripeness," *Williamson County*'s state litigation rule has deprived federal courts of federal question jurisdiction over takings claims and procedural and substantive due process claims that arise under the Fifth and Fourteenth Amendments to the Constitution. This is inconsistent with Congress' intent to afford federal jurisdiction over federal questions, *see* 28 U.S.C. § 1331, and this Court's precedent vindicating that jurisdiction. *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 285 (1913) (rejecting a contention that the federal courts lacked jurisdiction over a deprivation of property claim under the Fourteenth Amendment until the state courts passed on the issue because this would "cause the state courts to become the primary source for applying and enforcing the constitution of the United States in all cases covered by the 14th amendment."). It is time to reassess *Williamson County*'s state litigation requirement.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

DATED: November, 2008.

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